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# Contract labour

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## INTRODUCTION

Contract labour is increasingly becoming a prominent issue in different economic sectors in many countries around the world. There is no explicit internationally accepted definition of the term "contract labour", which is often used to refer to different ways of employing workers otherwise than under a normal employment contract between the workers concerned and the enterprise for which they work. This lack of conceptual clarity regarding contract labour gives rise to contradictory interpretations and inhibits the development of adequate protection for the workers involved.

The trend, reported in different countries and economic sectors worldwide, towards increasingly wider recourse to contract labour calls for a more careful analysis of this phenomenon with a view to preventing the workers involved from being treated unfairly.

Repeatedly expressed concerns about contract labour practices have led the ILO to address the question from the perspective of the possible setting of international standards on the subject. The Governing Body considered law and practice reports on this issue with a view to its possible inclusion in the agenda of the International Labour Conference at its 258th (November 1993), 259th (March 1994) and 262nd (March-April 1995) Sessions. In these reports, the Office made it clear that it considered that further research on the subject was required to allow it to obtain the information and develop the conceptual basis necessary for it to assess the feasibility of international standards on contract labour. After supplementary allocations had been approved for this purpose, the Office launched an intensive research project involving 20 countries worldwide and intended to build up comparative knowledge on the subject. National reports were commissioned from Argentina, Australia, Belgium, Canada, Côte d'Ivoire, India, Italy, Germany, Japan, Kenya, Malaysia, Mexico, Pakistan, Philippines, Portugal, Sweden, Thailand, the United Kingdom, the United States and Venezuela. This information was intended to serve as the basis for a new law and practice report containing some soundly based indications regarding the feasibility and possible content of international standards on the subject to be submitted to the November 1995 Session of the Governing Body. However, at its 262nd Session (March-April 1995) the Governing Body decided to include contract labour in the agenda of the 1997 Session of the Conference as a new technical standard-setting item. The present report is based on the national studies mentioned, together with other sources of information.

The question will be examined according to the double-discussion procedure established in article 39 of the Standing Orders of the Conference, and the Office has accordingly produced the present report in preparation for the first discussion by the Conference. Though this report does not claim to have reviewed the law and practice in all countries, it is aimed at presenting a fairly broad spectrum of existing law and practice, including the case-law of judicial and arbitration bodies, which are largely responsible for the way in which certain forms of contract labour are treated.

Considering the large number of countries examined and legal texts and case-law decisions consulted, references have had to be limited to the major items of legislation quoted, for reasons of space. The report contains a questionnaire to which governments are invited to give detailed replies and on the basis of which the Office will draw up a further report, in accordance with article 39, paragraph 3, of the Standing Orders of the Conference, indicating the principal questions which require consideration by the Conference.

The report is divided into six chapters. The first reviews the conceptual background of contract labour. An attempt has been made to provide a systematic view of the phenomenon and of its diversity, specifics and complexity.

The labour market context of the problem is evaluated in Chapter II. Together with the driving forces behind recourse to, and the extent of, contract labour, it aims to highlight what this pattern of workforce utilization offers to the social partners and how the latter perceive it.

Chapter III reviews the extent to which contract labour is covered by general labour law and collective agreements, particularly as regards the assimilation by the courts of the workers concerned to regular employees.

Chapter IV is aimed at giving a systematic overview, to the extent possible, of the various regulatory instruments, both statutory and non-statutory, established in different countries throughout the world. It also examines the role played by public authorities in regulating contract labour arrangements. The analysis of European Union law and judicial practices provided in this chapter gives an example of attempts to regulate certain issues related to contract labour on a regional basis, their results and the difficulties encountered.

The rights to organize and to bargain collectively have been widely recognized by many countries, both at national and international levels, as fundamental to the world of work. The extent to which contract workers enjoy these rights and certain practical problems emerging in this regard are addressed in Chapter V.

Chapter VI reviews existing international standards relating to contract labour and suggests how the Conference might approach the formulation of one or more new standards in this area. The available options need to be considered in the light of the national laws and practice reviewed in the report.

It is essential in any standard-setting exercise to define carefully the scope of a future standard. This is especially important for the elaboration of an international instrument on contract labour, owing to the variety of patterns and conceptual uncertainties of this phenomenon. As contract labour is on the borderline between labour law and commercial law, a future standard should clearly target problem areas from the point of view of protection of the workers affected, while care should be taken so that it does not unduly impinge upon economic activity.

It has been found in the past that member States whose law and practice are in conformity with the basic provisions of an international instrument are sometimes unable to ratify or accept it formally on account of relatively minor divergences from the precise wording of the instrument. These may be related to the scope of the instrument (the scope of the national legislation may not exactly coincide with that of the instrument) or to differences in the definition of the sector or sectors covered. Alternatively, they may relate to details in the application of the basic principles. Obviously, difficulties of this kind should be taken into account at the drafting stage so that as far as possible the instrument can overcome them without losing any of its

effectiveness. The questionnaire accordingly invites member States to indicate any particularities of national law and practice that are liable, in their view, to create difficulties in the implementation of the instruments under consideration in this report, and to make specific suggestions as to how these difficulties might be overcome.

In accordance with the provisions of article 39, paragraph 1, of the Standing Orders of the Conference, the present report must reach governments not less than 18 months before the opening of the 85th Session of the Conference in 1997. So that the Office has time to examine the replies to the questionnaire and prepare the second report, which in accordance with the provisions of article 39, paragraph 3, of the Standing Orders must be communicated to governments not less than four months before the opening of the 85th Session of the Conference, governments are requested to ensure that their replies reach the International Labour Office in Geneva by 30 June 1996.

The Office wishes to draw governments' attention to article 39, paragraph 1, of the Standing Orders, which calls on them to consult the most representative organizations of employers and workers before they finalize their replies. The governments' replies should reflect the result of these consultations and indicate the organizations consulted.

CHAPTER I

# EMPLOYMENT RELATIONSHIPS AND CONTRACT LABOUR RELATIONSHIPS

There is no agreement on the meaning of the term "contract labour". This term, and allied terms such as "subcontracting", are used variously in different countries to refer to different kinds of arrangements between enterprises and workers (often through intermediaries) whereby one or both parties seek to give the arrangement a different character from that of the normal employment relationship.

## EMPLOYMENT RELATIONSHIPS AND COMMERCIAL RELATIONSHIPS

The normal employment relationship is based on a contract of employment (explicit or implicit, written or oral) under which a worker agrees to perform certain work for and under the authority of an employer, who in turn undertakes to provide the necessary resources, machinery, materials, tools and working premises and to pay the worker for the work performed, as well as to respect whatever obligations are laid down by law in his or her treatment of the worker. Typically, employer and worker are asymmetrically positioned against each other. The former, who bears the major ownership responsibilities and business risks, has the economic and organizational authority to decide how the business should be carried out, including the manner of labour utilization. To obtain employment in such an enterprise, the latter has nothing to offer but his or her personal capacities and professional qualifications. Therefore, economic and organizational dependence has become the principal characteristic of the relationship between employers and workers.

Parallel to the establishment of employment relationships resulting from the engagement of workers to carry on the business of an employer, the enterprise enters into commercial relationships, through commercial contracts, with a view to obtaining from other enterprises the goods and services that are needed for this purpose. These contracts are deemed to be between independent contracting parties placed on an equal footing, neither of which is in a position vis-à-vis the other that justifies special protection by law beyond the normal legal support for the principle of the sanctity of contract.

## CONTRACT LABOUR

The economic, technological and organizational changes currently taking place throughout the world have brought significant transformations into labour markets. Such transformations affect the working patterns originally designed as a subordinate "master-servant" employment relationship established within the framework of an individual enterprise. New patterns of labour utilization have begun to develop and many of them challenge the traditional model of employment tailored schematically

as a "one enterprise — one employer" relationship. They often evolve outside the formal contractual framework, i.e. without the establishment of employment contracts, while retaining a major characteristic of the employment relationship, i.e dependency of the workers thus engaged on those for whom they work. In many countries certain relationships of this kind were developed long ago.

The concept of contract labour seems mainly to relate to relationships (either direct relationships between worker and enterprise or indirect relationships involving an intermediary) in which (i) the form of the relationship between the user enterprise and the workers concerned is that of independence and autonomy; (ii) the substance of the relationship is nevertheless asymmetrical because of the dependency of the worker on the user enterprise, resulting from the worker's organizational and technical subordination to the user enterprise. Thus the term "contract labour" is most often used to refer to situations in which the substance of the relationship appears to be similar to an employment relationship while the form is a commercial one, or at least where there seems to be some combination of employment and commercial aspects to the relationships established. This may occur, for example:

(a) where an enterprise hires workers for the normal work of the enterprise through intermediaries (other than simple recruiting agents, in which case there is no question about the employment relationship established) who retain some employer functions (such as the payment of wages);

(b) where the employer hires an individual or group of individuals to carry out the normal work of the enterprise but seeks to give him or her the status of an independent self-employed contractor or subcontractor.

Concerns arise in respect of these forms of contract labour mainly because of fear that the workers concerned, while substantively in the same relationship of dependency vis-à-vis the user employer as normal employees (although formally having the status of a commercial contractor or of an employee of a commercial contractor), will not receive the protection intended by labour law to be extended to such workers or that the employer's obligations under the law will be displaced from the enterprise in the best position to ensure their observance to an intermediary not in such a position.

The term "contract labour" has also been used to refer to the situation in which an employer contracts out to another enterprise, usually at a lower cost, the production of goods or provision of services that it is the normal business of the first employer to produce or provide. While this is quite clearly a commercial relationship, this phenomenon has been deemed in some countries or industries to warrant attention, as it may result in undermining the position of the existing employees of the first enterprise or shifting production from more stable and secure enterprises to less viable ones which are less likely to be able to observe their obligations with regard to their workforce.

The present report will look at all these kinds of relationships, and at attempts made in different countries to regulate them.

## Categories of contract labour

Contract labour is a dynamic, multifaceted and still insufficiently examined phenomenon, which makes it difficult to establish a clear classification. However, for

present purposes a certain preliminary and hypothetical categorization is necessary.

The fragmentary literature on the subject has most frequently referred, in this regard, to two major categories of contract labour, namely job contracting and labour-only contracting. These two terms, although rarely employed in law and practice, imply two major types of contractual arrangements through which labour is normally utilized. In reality, alongside these two antithetical contractual patterns, there are a great variety of patterns, which cannot be easily identified with either of the two categories but rather have elements of both of them.

### *Job contracting*

This pattern of contract labour occurs where an enterprise contracts with an established firm for the supply of goods or services, and the latter undertakes to carry out this work at its own risk and with its own financial, material and human resources. The workers employed to provide the goods or services remain under the control and supervision of the second firm (called the contractor or subcontractor), which is also responsible for paying wages and for fulfilling the other obligations of an employer. The user enterprise makes payments to the contractor or subcontractor on the basis of the work performed or services provided and not on the basis of the number of persons employed and hours of work spent. The only concern of the user enterprise is a finished product created by the subcontractor, not how and by whom that product has been generated.

Job contracting is formally, by its nature, simply a legitimate commercial activity which is properly governed by the general principles of commercial contract law.

Arrangements for the supply of goods or services between user enterprises and individual (self-employed) contractors or subcontractors, operating as established, solvent and legally recognized businesses, are also regarded as job contracting relationships.

### *Labour-only contracting*

In general terms, this kind of contract labour arrangement takes place where the exclusive or dominant objective of a contractual relationship is the supply of labour (rather than goods or services) by the contractor or subcontractor to the user enterprise. For this purpose, the user enterprise may bring the contract workers onto its premises to work alongside its own employees or it may have the work performed elsewhere, should the production process so require. There are a great many variants of the phenomenon, but all are characterized by the absence of a formal direct employment relationship between the user enterprise and the workers concerned.[1]

Under such arrangements the workers engaged are placed under the control and supervision of the user enterprise while at work. Subcontractors are paid by the user enterprises on the basis of the number of persons engaged, not the finished product expected. Wages are normally negotiated and settled directly by the subcontractors with such workers. The power to hire and fire in respect of these workers apparently lies with the subcontractors, although the final choice in either case rests with the user enterprises.

There are also arrangements whereby the user enterprises contract directly, i.e. not through an intermediary, with individual workers or groups of individual workers to perform certain work for a fee but not for a wage. What makes this kind of arrangement similar to labour-only contracting is that there is no formal employment relationship established between the parties concerned; the workers engaged may not fall under national definitions of self-employed persons since they are not the owners of established, solvent and legally recognized businesses. The significant degree of flexibility and informality of this kind of "individual" or "direct" labour-only contracting makes the identification of its contractual nature especially difficult. This frequently calls for the intervention of a judicial body to qualify the arrangement as either an employment relationship or job contracting (contract for services).

While discussions of contract labour and concern for workers employed under different forms of contract labour often relate to relationships that fall within both the labour-only and job-contracting categories, it is clear that not all kinds of job contracting (contracts for the supply of goods and services) are deemed to be contract labour. When considering contract labour in the form of job contracting, one is generally looking at contracts for the provision of services, which in reality may be difficult to distinguish from labour-only contracting, and more rarely contracts for the production of goods. Moreover, the forms of job contracting that are attracting attention as contract labour seem to be those defined by reference to criteria related to the dependency of the workers concerned on the contracting enterprise or to the prejudicial impact of the contractual relationship on the regular employees of the contracting enterprise.

### Contracting in and contracting out

In considering job contracting, two patterns of contract labour arrangements are sometimes distinguished, depending on the place where the contracted work is carried out or the services provided, namely contracting in and contracting out. *Contracting in* takes place when the subcontractor undertakes to do work or provide services on the premises of the user enterprise. *Contracting out* happens when the user enterprise externalizes certain work to be performed by an outside subcontractor.

Although in both cases the relationship between the user enterprises and the subcontractors is based on contractual arrangements of a similar nature, i.e. on commercial contracts, the interests of the workers involved might be affected differently. While in contracting-in arrangements problems concerning the employment and collective labour relations status of the contracted-in workers become a priority, in contracting-out arrangements the job security of the regular employees of the user enterprises comes to the forefront.

### Terminology

It should be noted that the terms "contract labour", "contracting" and "subcontracting" are used widely and often interchangeably. Therefore they do not necessarily refer to different patterns of contractual relationship. However, a certain substantive distinction is made between them in some countries. In the United Kingdom, for example, the term "subcontracting" is typically used to describe the provision of a skill or service by a third party in areas such as cleaning, security,

catering and maintenance and some white-collar functions, whereas "contracting" is frequently, though not invariably, associated with construction and related sectors.[2] In many other countries, however, the only difference between these two words lies in the sequence of contracting arrangements, when the first contractual arrangement is called "contracting" and all the following arrangements "subcontracting". The word "subcontracting", however, is more frequently used in labour law and practice. For convenience, the word "subcontracting" is used below to cover all kinds of contractual arrangements whereby a contractor (or subcontractor) undertakes to perform work or provide services for other enterprises.

## Diversity of patterns

In designing a typology of contract labour arrangements, attention should also be given to how this specific pattern of labour utilization relates to a variety of other non-standard forms of employment rapidly developing in contemporary labour markets worldwide, namely home work, casual work, work through temporary employment agencies, leasing of workers, etc.

The schematic classification of contract labour arrangements into job contracting and labour-only contracting does not adequately reflect the full range of contract labour arrangements existing in practice. Together with these two schematized forms of contract labour arrangements, there are a great many variants which cannot be easily identified with either of them or may possess characteristics of both. Moreover, the problem is also exacerbated by the fact that in many instances such arrangements are still carried out on an informal basis, i.e. with no intention of fitting into the existing formal contractual patterns and procedures.

Contract labour arrangements may be either triangular or bilateral. In the former there are always the workers engaged and the user enterprises. As regards the third party, there are two main alternatives. On the one hand, it might be an established business supplying goods or services to the user enterprises with its own workforce, of which it is the employer (job contracting). On the other hand, it can be an individual or agency intermediary whose *raison d'être* is solely or mainly the supply of a workforce to the user enterprises (labour-only contracting).

### *Triangular arrangements through intermediaries*

#### *Individual intermediaries*

The supply of contract workers through individual intermediaries is a long-standing practice in certain economic sectors such as construction, agriculture or manufacturing.

In the agricultural sector in Chile, for example, individual labour-supplying agents are called *enganchadores*.[3] They either operate solely as intermediaries, paid by the user enterprises a fixed amount per worker supplied (while some *enganchadores* are independent persons, others are employees of the user enterprises), or supply workers for the performance of specific tasks and assume certain management and supervisory responsibilities in relation to the workers engaged, including payment of wages.

A specific pattern of labour market activity called *tâcheronnat* has traditionally existed in certain economic sectors, such as construction, agriculture and transport, in a number of French-speaking African countries.[4] A *tâcheron* is an individual who contracts with user enterprises to perform work or services for an agreed price. For this purpose, the *tâcheron* recruits the necessary workers and directs them in performing the work. According to the classification proposed above, this kind of labour market activity might seem to be job contracting (and those involved in it subcontractors). However, what makes this activity different from job contracting is that the only service provided by the *tâcherons* is actually labour, since they normally do not own any substantial assets and hence do not furnish the financial and material resources necessary to carry out the contracted work. This makes the activities of the *tâcheron* similar to labour-only contracting, described above.

Another kind of individual labour market activity, specializing in the supply of homeworkers, is practised by the *talleristas* in some Latin American countries (for example in Argentina and Uruguay).[5] The *talleristas* are individual owners of small workshops who undertake to manufacture products for user enterprises and who employ workers to do this job. The contractual status of the *tallerista* is recognized by Argentine jurisprudence as twofold, i.e. they are considered as homeworkers in relation to the user enterprises and as employers of the workers engaged. The *talleristas* have been unionized in Argentina as homeworkers. However, they act as employers as regards the remuneration of the workers they engage.

In the case of these individual labour market agents, any problem with regard to the employer's statutory obligations towards the workers engaged becomes especially complicated. The status of such agents is often difficult to identify. On the one hand, they may have no direct employment relationship with the workers engaged. On the other hand, their role goes beyond mere recruitment arrangements and frequently involves certain employer's functions such as assignment and supervision of work and the fixing and payment of wages. It may therefore be difficult in any particular case to answer the question: who is the legal employer? This has a number of implications for the implementation of labour and social security legislation.

*Labour supply agencies*[6]

In other cases, contract workers are employees of labour market agencies, such as temporary work agencies (TWAs) or staff leasing agencies.[7] Their employer status makes them different from the agencies to which the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), initially applied, and which merely assist employers and workers in finding each other, maintain no employment relationship themselves with the workers concerned and have no supervisory or management function with regard to them. These agencies carry out a labour market "brokerage", a function which is confined to bringing employers and jobseekers together, leaving both sides free to decide whether or not to establish an employment relationship.

The TWA-type agencies, however, play another role in labour markets. They themselves employ a workforce for the purpose of supplying it to user enterprises, normally, but not exclusively, on a temporary basis. The result is a specific triangular relationship whereby workers who are employees of these agencies find themselves under the authority of the user enterprises, with whom they have not signed contracts of employment. This therefore means that the workers engaged have become

dependent not only on their immediate employers, i.e. the agencies, but on the user enterprises. The Labour Code of France defines employment through temporary employment agencies as the supply to clients on a temporary basis of employees recruited and remunerated by an individual or body corporate on the basis of an agreed level of skill (s. L. 124-1). Similar formulas have been promulgated in the recent acts regulating the activities of such agencies, adopted in Switzerland in 1989, Sweden in 1991 and Luxembourg and Spain in 1994. The Law on the proper operation of temporary work agencies and improved working conditions for temporary workers, 1985 (Worker Dispatching Law) of Japan (as amended in 1990) defines the supply of temporary workers as "causing a worker or workers employed by one person to work for another person under the latter's direction, whilst maintaining their employment relationship with the former person" (s. 2).

The role played by TWA-type agencies in labour markets is still a matter of controversy for academics and practitioners at both national and international levels. While some of them consider this kind of labour market subcontracting to be a normal business activity carried out by fully-fledged employers, others disagree, saying that the employment relationship between such agencies and the workers engaged is purely formal, whereas a real employment relationship exists between these workers and the user enterprises to whom the agencies delegate their employer's authority.[8] Indeed, the answer depends mainly on what criteria are used to identify "contract labour" or "labour contracting", the concept of which has not yet been clearly delineated in law and practice. Judging by the formalities prescribed in the relevant regulations, these kinds of labour market activity might be regarded as labour contracting or, to be more exact, as labour-only contracting, according to the categorization suggested above. The significant employment authority of the user enterprises over the workers cannot be ignored either. What is quite apparent is that the employment status of such workers does not fit into the above-mentioned traditional "one enterprise — one employer" employment standard. Regardless of whether this arrangement is called "contract labour" or something else, what really matters is that this "triangular" employment relationship should be appropriately regulated for the benefit of all the parties involved — the user enterprises, the agencies and the workers concerned.

### *Arrangements with no "third-party" involvement*

Labour contracting can also take place without intermediaries when a worker or a group of workers undertakes to work for a user enterprise without formally entering into an employment relationship with the latter. These kinds of arrangement are often entered into when the subcontracting party is not a formally recognized business set up in accordance with the legal requirements regarding the establishment of an economic activity.

#### *Individual contracting*

This pattern of contract labour occurs when an individual worker enters personally into a formal commercial contract or informal relationship with a user enterprise to provide the latter with his or her services. Such individual subcontractors may have the status of self-employed persons. The main characteristics of their contractual status are that they (i) have no formally established employment

relationship with the user enterprises; (ii) may work for more than one user enterprise; (iii) exercise a higher level of discretion and autonomy compared with that of workers under a contract of employment. This allows this kind of contractual arrangement to be placed under the category of job contracting.

Self-employed persons are generally legally recognized as independent individual businesses which enter into contractual relationships with one or several other independent businesses with a view to providing the latter with certain work or services for a fee, normally at their own risk and with their own finances, resources, materials and tools.

However, specific problems of social and legal protection may arise when job contracting is performed by individual subcontractors whose relationship with user enterprises differs from that existing between truly independent businesses. Such individual workers may carry out certain work or perform services for a user enterprise on a permanent or periodical basis and may, to a certain extent and in different respects, be dependent on it. The user enterprises may also exercise control over the performance of services provided to them by these individual workers. In spite of their formal independence, the latter actually have a status which is very close to that of a traditional employment relationship.

There are many variants of individual contracting or subcontracting, which differ according to the substance of the work or services performed.

They may not necessarily display all the above-mentioned characteristics of self-employment. First, in many instances individual subcontracting is carried out on an informal basis and the individual concerned may not be deemed to be a properly established and formally recognized business. Second, the only (or main) service offered to the user enterprises is often the worker's labour, with no significant contribution of finances, resources, materials or tools. Third, having no assets other than their labour capacity, such workers do not bear any economic risk for the business to which they contribute, or such a risk is confined to their fee. Lastly, such individual workers may perform work for or provide services to a single user enterprise on a permanent or periodical basis and, in important respects, be dependent on it. Such dependency becomes especially apparent when the user enterprise exercises control and supervision over the performance of the work or services performed for them by these individual workers. In spite of their frequent formal independence, the latter actually tend to become dependent on the former and are thus in fact in a relationship that is very close to that of a traditional employer-employee relationship. As a result, such workers may be regarded neither as established individual self-employment businesses nor as employees, and thus may not receive the protection of labour and social security laws.

*Group (team) work arrangements*

Work in groups has become a long-standing tradition in some economic sectors such as agriculture, construction and transport, in many countries around the world. These groups, often called "gangs", normally agree to work for user enterprises on a piece-rate basis and are characterized by a certain degree of self-organization. Their leaders cannot be regarded as intermediaries since they are simply members of the gangs who are in charge of obtaining and negotiating the work and the fee. They may not receive any extra reward and share the fee equally with the other gang members.

The workers engaged often do not have any determined employment status in relation to the user enterprises.

However, the opposite is also sometimes the case, when labour law extends protection to such workers. The consolidated text of the rules governing contracts of employment (Contracts of Employment Act) of 1986 of Argentina, for example, contains a separate chapter (Chapter V of Title III) covering contractual arrangements between employers and groups or teams of workers. The Act recognizes the existence of an employment relationship between each member of a group or team *(cuadrilla)* and the user enterprise, and prescribes that a contract of employment for a group or team shall be deemed to exist where a contract is concluded by an employer with a group of workers who, acting through a delegate or representative, undertake to perform services corresponding to the employer's activity. The employer is considered to have the same rights and obligations under this Act towards each member of the group, subject to the limits imposed by the nature of the task to be performed and the composition of the group. Where a group wage has been agreed upon, the members of the group shall be entitled to receive a share corresponding to their contribution to the results of the work done. When a worker leaves the group or team, the delegate or representative shall replace him by another member and, where necessary because of the nature of the tasks to be performed and the personal qualities required, shall propose the new member for the employer's approval. A worker who withdraws shall be entitled to receive the share due to him in respect of the work already done. Workers engaged by the employer to cooperate with the group or team shall not share in the group wage and shall make all arrangements for their wages with the employer himself (s. 101).

### *Mixed arrangements*

A specific pattern of contract labour arrangements which combines intermediary activities and self-employment has developed in the construction and meat industries of Australia.[9] The firm "Troubleshooters Available" was one of the first to experiment with this kind of labour supply model. The firm was established in the mid-1970s to provide short-term independent contractors, i.e. self-employed workers, commonly known as contract workers, in the building industry. The operations of this type of agency involve supplying workers to builders and charging the latter for the services provided. When a user enterprise requires additional workers for a day, days or perhaps even months, the agency supplies the workers and then invoices the user enterprise at an hourly rate for the workers' attendance at the site. The agency maintains a pool of workers, varying in skill from labourers to site managers, who are available to perform jobs at short notice. The workers inform the agency daily of time worked, and are paid weekly through the agency, based on an hourly rate. The user enterprises direct workers to perform whatever work is necessary, but both have the right to refuse to work together. Questions concerning standards of work are the responsibility of the worker, not of the agency. Although the agency's operations require workers to sign a contract stipulating certain conditions relating to legal obligations and responsibilities, the workers are not its employees. The agency is not responsible for deducting income tax from payments made to workers. The workers acquire their own insurance for public liability. Entitlement to conditions such as holiday, sick leave and long-service leave provided by the award for the industry is

specifically excluded from the relationship. Workers agree to provide basic tools of the trade.

**Notes**

[1] See for details E. Epstein and J. Monat: "Labour contracting and its regulation: I and II", in *International Labour Review* (Geneva, ILO), Vol. 107, Nos. 5 and 6, May-June 1973, pp. 451-470 and 513-528, respectively.

[2] P. E. Leighton: *Contract labour in UK: Law and practice*, report submitted for the ILO research project on contract labour, May 1995, p. 3.

[3] For details see J. Echenique: "Labour contracting in Chile's fruit agriculture", in P. Egger and P. Poschen (eds.): *Labour contracting and employment in construction, forestry, plantations and manufacturing* (Geneva, ILO; forthcoming).

[4] See: "Labour law reforms in French-speaking Africa: Shrinking state role and new flexibility", in *International Labour Review*, Vol. 134, No. 1, 1995, pp. 89-90.

[5] For details see L. Vega Ruiz: "Home work: Towards a new regulatory framework?", in *International Labour Review* (Geneva, ILO), Vol. 131, No. 2, 1992, p. 203.

[6] This problem is addressed in more detail in ILO: *Revision of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96)*, Report IV (1), International Labour Conference, 85th Session, Geneva, 1997.

[7] For details see ILO: *The role of private employment agencies in the functioning of labour markets*, Report VI, International Labour Conference, 81st Session, Geneva, 1994.

[8] For a discussion of these problems see S. Ricca: "Private temporary work organizations and public employment services: Effects and problems of coexistence", in *International Labour Review* (Geneva, ILO), Vol. 121, No. 2, 1982, pp. 141-153; A. S. Bronstein: "Temporary work in Western Europe: Threat or complement to permanent employment?", in *International Labour Review* (Geneva, ILO), Vol. 130, No. 3, 1991, pp. 291-310; R. Blanpain (ed.): *Temporary work and labour law of the European Community and Member States* (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1993), pp. 6-7; ILO: *The role of private employment agencies* . . ., op. cit.; ILO: *The role of private employment agencies in the functioning of labour markets*, Report of the Committee on Private Employment Agencies, Provisional Record No. 21, International Labour Conference, 81st Session, Geneva, 1994.

[9] For details see E. Underhill and D. Kelly: "Eliminating traditional employment: Troubleshooters Available in the building and meat industries", in *Journal of Industrial Relations* (Industrial Relations Society of Australia), Vol. 35, No. 3, Sep. 1993, pp. 398-423.

## CHAPTER II

# LABOUR MARKET CONTEXT

### DRIVING FORCES

One of the major characteristics of contemporary labour markets worldwide is their significant fragmentation. As a result of this, employment patterns have begun to multiply. The above-mentioned traditional model of the long-term employment relationship between employer and employee is currently being supplemented by a variety of "non-standard" or "atypical" forms of employment.[1] The substantial increase in the use of the latter, including contract labour, reported from many countries and parts of the world is frequently attributed to both demand and supply factors in labour markets.

As far as the *supply* factor is concerned, mention should be made, in the first instance, of the high levels of unemployment which are characteristic of many labour markets around the world. Jobseekers have become more inclined to take up "atypical" employment, often as the only alternative to unemployment. Labour policy-makers of a great number of countries, concerned to reduce unemployment levels, have become more amenable to removing or modifying existing restrictions on recourse to "non-standard" patterns of employment with a view to making labour markets more responsive to the increasingly dynamic and multifaceted economic environment.

Account should also be taken of demographic changes contributing to the growth of the supply side of "atypical" employment in labour markets. The growing number of older workers and a greater proportion of women, reported in many countries, are also fuelling the recourse to "non-standard" patterns of employment which frequently prove to be more attractive to some people in these categories of workforce than the "standard" employment relationship. This trend is exacerbated by a growing number of the younger generation of jobseekers, some of whom are not giving preference to the traditional employment model and are instead seeking less stable forms of participation in economic life. On the other hand, this shift in preferences should be kept in perspective. Most workers, including those in these categories, in most countries still prefer the normal, more stable kind of employment relationship. The main cause of the growth of non-standard forms of employment such as contract labour derives from the demand side.

Turning to the *demand* side of labour markets, consideration should be given to a number of driving forces contributing to the expansion of various "atypical" patterns of employment, including contract labour. The first is the above-mentioned apparent trend evidenced worldwide towards greater flexibility, decentralization and specialization of production, as well as the emergence of new technologies and work organization patterns, which result from increasing domestic and international

competition, globalization, and growing turbulence and interdependence of economic and financial markets.

Economic difficulties, which many national economies are currently trying to cope with, also push employers to reduce the labour costs frequently associated with "standard" employment by shifting to "non-standard" patterns. As a result, there appears to be some tendency among many businesses to follow a strategy of creating a "core" skilled permanent workforce of regular employees and a "peripheral" workforce of less secure and more disposable workers. High levels of unemployment in many countries in which this is taking place make such a strategy easier to implement.

The widespread decline of the manufacturing industries and the expansion of the services sector are also contributing to the rapid expansion of "non-standard" employment patterns.

Last but not least, mention should be made of labour shortages experienced in some industries in a number of countries, which have become a major driving force for labour migration. In Malaysia, for example, most foreign migrant workers, who may number from 1 to 1.5 million, are employed as contract workers.[2]

Apart from these objective factors contributing to the expansion of "non-standard" patterns of employment, there are also some subjective stimuli which drive employers towards broader utilization of contract labour. Those most frequently referred to are attempts to avoid what many employers consider to be excessive labour rigidities and legal and collective bargaining constraints which have become essential characteristics of "standard" employment patterns.

The nature of the workforce involved in the various forms of contract labour arrangements varies according to a number of factors, including the economic sector in question and the labour market situation of a particular country. It ranges from low-skilled workers traditionally engaged in agriculture, construction and transport industries, to highly educated professionals providing services in such areas as legal assistance, accounting, engineering, advertising, information analysis and treatment, etc.

The recourse to contract labour in the industrialized and developing countries may be attributed to different reasons, for example, stemming from dissimilarities in their levels of economic and technological development, specifics of work organization and the extent of social protection.

There are a variety of factors justifying the increase in contract labour utilization, many of which are interrelated. These factors may be broadly divided into two major categories, namely internal catalysts and external pressures.

As regards the *internal catalysts*, mention should be made, in the first instance, of the specifics of the production processes existing in a number of industries. The contracting out of work in the construction, forestry and plantation industries, for example, with their cyclical levels of activity, has become an important element of work organization allowing for the optimization of production operations. Secondly, in many countries, some employers have endeavoured to reduce production costs by concentrating resources on the main ("core") business activities and externalizing "peripheral" activities to outside subcontractors. Thirdly, a desire to enhance job security for regular employees constituting a "core" workforce might sometimes also be a reason for contracting out those types of jobs that, from an economic point of view, are most vulnerable. Lastly, account should also be taken of the possible

temptation to use contract labour for the purpose of evading the obligations imposed by labour legislation and collective agreements in terms of conditions of work, including wages, and social insurance coverage.

There are also certain *external factors* which motivate recourse to contract labour. On the one hand, fluctuating product and commodity demands, which are characteristics of any market economy, particularly in uncertain times, may induce employers to have recourse to contract labour as an important supplement to directly employed workers. In this regard, some employers consider contract labour to be an essential element of labour market flexibility enabling them to adapt to an increasingly competitive and globalized economic environment. On the other hand, shortcomings in the operation of traditional labour market institutions such as public employment agencies, which fail to meet enterprises' intermittent or short-term workforce requirements in a number of industries (such as construction, forestry and plantations), may be partly responsible for the growing recourse to contract labour in these industries.

A number of social determinants also leave some room in the labour market for contract labour. These determinants differ in industrialized and developing countries. For workers possessing skills in intermittent or short-term demand, especially when such workers are far from retirement age, certain characteristics of contract labour existing in industrialized countries — such as a greater degree of economic autonomy and flexibility of conditions of work, possibilities of higher income and lower taxes — may be seen as advantages outweighing the disadvantages of less job security and fewer social benefits. Also, in many remote areas of developing countries contract labour may still be the only means of obtaining wage-earning employment. This may also be true more generally for many unskilled workers faced with the situation of chronic unemployment and underemployment that persists in these countries.

## The extent of contract labour

Today, various forms of contract labour are being utilized in many economic sectors of a great number of countries around the world, including both industrialized and developing economies as well as the countries in transition. This is true for both the private and public sectors. In some economic sectors, such as agriculture, retail trade and construction, contract labour has already been practised for many decades, while in other manufacturing and service industries, including textiles, clothing, forestry, canteens and restaurants, offshore petroleum installations and inland transport, contract labour still has a relatively short history.[3] It is also growing in newly emerging economic sectors, such as high technology industries (telework, for example).

Historically, labour contractors have played an important role in the plantation industry. The increasing tendency to use contract labour on plantations has been repeatedly noted by the ILO Committee on Work on Plantations.[4] In 1990 an average of 12 per cent of all plantation estate workers in Malaysia were recruited through labour contractors, but the figure was as high as 35 and 38 per cent on oil palm and cocoa estates, respectively.[5] Contract labour is also reported as a common practice on sugar plantations in India and the Philippines and on coffee plantations in Kenya.[6] In Mexico, temporary labour for the coffee and cotton harvests is largely supplied by labour contractors *(enganchadores)* recruiting among migrant Indian workers.[7] In

Brazil, labour contracting (of workers supplied by *empreteiros* or *gatos*) is reportedly widely practised in intensive agro-industrial schemes producing for export.[8] In the United States, farm labour contractors supply some 16 per cent of all farmworkers, but over 30 per cent in California and Florida. Between 1980 and 1990, the number of farm labour contractors increased by 20 per cent and the number of workers supplied through their services by 53 per cent.[9]

A similar trend has been reported in the forestry industry.[10] Contract labour in the form of intermediary-supplied workers or normally self-employed workers accounts for a significant share of the workforce in Chile (almost 100 per cent), Finland (80 per cent), France (60 per cent), Indonesia and Malaysia (both over 50 per cent), Sweden (70 per cent), the United Kingdom (over 50 per cent) and the United States (close to 80 per cent). It is rapidly increasing in many other countries, including Austria, Belgium, Canada, Germany and Hungary. Employment patterns in this sector have changed dramatically over the last years. Processing firms have by and large withdrawn from logging and harvesting, switching to subcontractors for these tasks. Mechanization of harvesting has also facilitated this change. A variety of new "non-standard" employment patterns that range from self-employment to labour-only contracting have significantly altered the employment picture in this industry.

Contract labour has also been intensively utilized in the extractive industries of a number of countries, such as the mining and petroleum industries. The incidence of contract labour is especially impressive on offshore petroleum installations.[11]

Construction is among the industries where contract labour has received broad recognition. In Brazil, some 30 per cent of the construction workforce consists of employees with no formal contract, whereas another 30 per cent are registered as self-employed. It is estimated that these workers are to a large extent contract workers recruited either through subcontractors or as nominally self-employed. Over the 1980s the share of self-employed workers in the total construction workforce increased in this country from 23 to 31 per cent. In Malaysia, the incidence of contract labour in the construction industry is estimated at over 60 per cent of the industry's workforce. Some 50 per cent of these contract workers are foreign migrant workers.[12] In the United Kingdom, some 58 per cent of the construction labour force in 1991 was composed of self-employed workers (up from 31 per cent in 1979), two-thirds of whom are deemed to be only nominally self-employed, according to a government report.[13]

Contract labour is quite common in the manufacturing sector. In India 32.6 per cent of all industrial establishments used contract labour in 1985-86, compared to 15.3 per cent in 1973-74.[14] It is also reported to be quite prevalent in Hong Kong in construction, stevedoring, shipbuilding and repair, as well as in textiles and electronics. One survey indicates that 10 per cent of small and medium-sized establishments (up to 100 employees) use ambulatory labour regularly. Groups of workers led by a gang leader (*pao tao* or subcontracting head) move from one establishment to another according to needs.[15] In Malaysia, one industrial establishment survey revealed that the number of contract workers as a share of total employment was particularly significant in the wood industries (where contract labour accounts for over 20 per cent of employment in 57.7 per cent of establishments), non-metallic minerals (41.1 per cent of establishments), and fabricated metals, basic metals, textiles and food industries (between 10 and 15 per cent of establishments).[16] Another survey in Pakistan reveals that approximately 34 per cent of the total

workforce in the large manufacturing sector in the province of Sind is composed of contract labour.

In services, including transport, contract labour also seems to have expanded considerably in the last decades. In the United States, for instance, where cost-cutting and outsourcing are often resorted to, the number of temporary and contract workers has increased dramatically over the last decades and currently accounts for a quarter of the total workforce. Highly skilled professionals account for approximately 24 per cent of these contingent workers, including lawyers, doctors, scientists, computer analysts and financial auditors.[17] In general, the number of persons working for personnel supply agencies has risen from 250,000 in 1975 to 1.9 million in 1993, a growth rate that is 13 times that of the directly employed workforce.[18] In Germany, the number of workers supplied by temporary work agencies was about 140,000 in 1992.[19]

The major recent change has been in the development of subcontracting in the public sector of a number of countries where government policy has encouraged or even required "market testing" of certain public sector functions by contracting them out through market tendering.

In the United Kingdom, for example, a number of the public sector functions must be subject to Compulsory Competitive Tendering (CCT) aimed at reducing public expenditures. The Local Government Act 1988 requires the client to accept normally the lowest tender. Current in-house staff also has to bid against a tender submitted by a potential subcontractor. As a result, subcontracting has gone far beyond its above-mentioned traditional domain, such as refuse collection, catering, cleaning and building (or grounds or vehicle) maintenance, and currently involves various high-skilled occupations such as accountancy, legal, architectural and administrative occupations. In addition to this process of compulsory competitive tendering, many public sector organizations tender for other services on a voluntary basis. Inevitably, subcontractors themselves have changed in character, often providing a wide range of skills through one organization, including management skills (facilities management). Some subcontractors have become large, complex and highly successful organizations. Currently, 54 per cent of all contracts subject to this process in the United Kingdom are estimated to have remained with in-house staff. It is thought, however, that the value of contracts won by the private sector is now £356m, ensuring a profit of £92m per year.[20]

Therefore, the major policy imperative for contracting out of public services is economic. It aims not only at savings with regard to the cost of providing a service but also at ensuring that the service will be more efficiently and effectively provided. However, existing evidence has shown controversial results. A number of services have indeed been provided more cheaply by subcontractors. In the United States, for example, cost savings resulting from contracting out of public services have reportedly amounted to 40 per cent.[21] In some other instances such savings have been small or have not been achieved at all and subcontracting has proven to be more expensive. As mentioned in recent ILO studies on the subject,[22] contracting out of public services is unlikely to give rise to problems, provided that the service concerned is clearly defined and controlled, competition is guaranteed and the employment and working conditions of the employees concerned are sufficiently safeguarded; it is rare, however, for all of these conditions to be met.

## Pros and cons of contract labour

### *Employers' perspective*

From the point of view of the user enterprises, recourse to contract labour yields a number of benefits in terms of possible increases in the competitiveness and efficiency of their businesses.

The flexibility which contract labour arrangements provide is one of the factors most frequently referred to, in so far as the utilization of the workforce is concerned. On the one hand, contract labour plays an important role in industries with cyclical levels of production and fluctuating output and demand, such as forestry, construction, petrochemicals or plantations.

On the other hand, contract labour gives employers the opportunity to optimize workforce composition by seeking an appropriate balance between its "core" and "peripheral" components and between the higher- and lower-skilled workers required. However, the potential of this flexible "core-periphery" model[23] of labour utilization, whereby the "core" workers provide for greater functional flexibility and the "peripheral" workers contribute to numerical flexibility, still remains a debatable subject in literature on the subject.[24]

In the employers' view, such flexibility is believed to help reduce medium- or longer-term wage bills. Contract labour can contribute to lower overall wage costs for a similar quantity and quality of work as well. This can happen through either lower indirect wage costs (by reducing social security payments) or lower direct wage costs, or both.

Higher productivity and reduced administrative costs are also cited as reasons for having recourse to contract labour arrangements.

However, there are also some potential disadvantages of contract labour arrangements for the user enterprises. They include the possibility that the workers concerned will be more volatile, less skilled and less committed, which would negatively offset quality and productivity, that problems of labour discipline will arise and that the relationship with regular employees, who will certainly not be happy with the consequences that contract labour arrangements might have for their jobs, will be difficult.

As regards the interests of contract labour intermediaries, where these are allowed, they are obvious since labour contracting is their "core" business providing them with income and profits from the charges paid either by the user enterprises or by the workers engaged, or by both. In order to receive extra profits, some intermediaries charge interest when recovering workers' debts for various services provided to them, such as transport, accommodation, and loans in the form of wage advances. Such practices seem to be inconsistent with the Protection of Wages Convention, 1949 (No. 95), which stipulates that "any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labour contractor or recruiter), shall be prohibited" (Article 9).

### *Workers' perspective*

From the standpoint of the interests of the workers engaged, each particular contract labour arrangement can provide advantages or disadvantages, or both.

In a situation of labour surplus and job scarcity, contract labour arrangements sometimes give the workers concerned their only chance to secure employment. This consideration frequently outweighs possible disadvantages of being a "non-standard" employee.

For certain categories of jobseekers looking for more variable patterns of employment, contract labour has become an important instrument of flexibility allowing them to balance their aspirations with the requirements of labour markets.

A gateway to regular employment with the user enterprises is one of the advantages which contract labour may offer to the workers involved. More and more frequently, various businesses prefer to hire their permanent staff from the ranks of agency-supplied workers so that they can assess an individual's performance prior to incurring the obligations of an employer.

As already mentioned above, recourse to contract labour is sometimes regarded as an important instrument to increase job security for regular employees of the user enterprises. Contract workers are sometimes looked upon as a "buffer" workforce which is more easily dispensed with when the demand for such labour decreases.

From the point of view of self-employed workers, a major attraction is that they pay lower income tax and avoid employment deductions, thereby receiving greater take-home pay than those who have a "standard" employment status. However, the "high pay" differential enjoyed by some self-employed diminishes when the user enterprises remove from the contract price the value of fringe benefits such as health insurance, pensions and holidays that regular employees receive.

Indeed, the main question arising with regard to contract labour is whether or not the workers concerned enjoy an adequate level of social protection compared to that afforded to directly employed workers. In practice, the reply is frequently negative. Due to the ambiguities in defining the legal nature of contract labour, workers thus engaged often find themselves in a legal vacuum, deprived of the protection afforded by labour legislation for workers employed directly. Subcontractors may provide cont[illegible]t workers with only rudimentary social security coverage against accidents, unemployment and occasionally for pensions, or none at all. There are uncertainties about whether or not the user enterprises are responsible for social security coverage.

Since the employment status of contract workers is often ill-defined, they are frequently not entitled to the same level of conditions of employment, wages and benefits as received by the regular employees.

The employment of contract workers is less secure than that of the latter. Hours of work are frequently longer for contract workers whose remuneration is based on output and linked to specific tasks; normal working hours are often exceeded and atypical daily and weekly working times tend to prevail. Contract workers are also frequently not entitled to annual leave or many other fringe benefits.

Wages for contract workers may be lower, depending on the form of payment, the commission charged by an intermediary, and the type of work. Minimum wage regulations, where they exist, may not be applicable to them if they are deemed to be self-employed. Nor do they always receive the same remuneration that collective agreements provide for workers who are employed directly.

Recourse to the services of nominally self-employed workers instead of employees, although it is one of the most widely used forms of contract labour, may be

abused or could lead to exploitation, especially when the self-employed subcontractors have to provide their own equipment, materials, etc. Many of them are less likely to have access to pension and sick pay arrangements.

High work pressure, unclear responsibilities with regard to observance of conditions of work, including safety and health regulations, and their supervision, as well as a general lack of training, in some cases make contract labour an area with a high risk of occupational accidents and diseases. For instance, in the pulp and paper industry, where contract labour is quite broadly utilized, the poor safety record is often associated with this pattern of employment.[25]

A study carried out by the National Health Insurance in France holds the spread of these forms of employment responsible for much of the increase in accident rates in recent years. Temporary employees supplied by labour-leasing firms have twice as many accidents as the average worker. About half of the difference can be attributed to the composition of the temporary workforce and the type of work, but the residual half is apparently due to the temporary nature of the situation. Information and training in safety matters are deficient. Often even the suitability of a worker for a particular post is not checked.[26]

Because of the nature of the contract labour relationship, unionization rates among contract workers are frequently much lower than those for the regular workforce.

Lastly, contract workers whose status as employees is not clearly defined might also have certain difficulties with regard to protection of their rights through judicial proceedings. In Australia, for example, workers who are not recognized as employees are denied access to the tribunals set up to resolve industrial disputes. Without this avenue the settlement of disputes through courts or alternative dispute resolution is expensive.

The balance between the pros and cons of contract labour may vary significantly according to the economic, social and legal context of each individual country. It may also depend on the characteristics of the industry or enterprise in question. In general terms, the extent of contract labour is determined by the interplay of a number of labour market variables, including demand and supply, competition, prices, productivity, production and social costs.

### Respective attitudes of the social partners

Employers and unions have different attitudes towards contract labour, depending on the effects which these labour market arrangements have on their respective interests.

Employers, in general, favour this pattern of workforce utilization as an important instrument for increasing competitiveness and production efficiency. They point out the intermittent nature of certain jobs and the fact that many such jobs are outside the normal ("core") activities of enterprises. Not surprisingly, organizations representing subcontracting businesses are themselves enthusiastic about the prospects for the future. However, businesses in the high-tech industries, such as computer technology, express certain reservations concerning the quality and efficiency achieved by some subcontractors.

Public sector employers, especially local authorities, which frequently include elected members, have shown a varied response, not least because subcontracting sometimes becomes a sensitive political issue. Managers who are responsible for the

contracting out of public services also have certain reservations with regard to difficulties frequently encountered in managing the work performed by the subcontractor.

As regards the extent to which contract labour arrangements should be regulated, employers seem in general to have certain reservations. They worry about possible "overregulation" that can have negative effects on business opportunities and economic progress. Some employers, however, recognize that some kind of legislative intervention, especially with regard to labour-only contracting, may be desirable in order to establish clear-cut "rules of the game" and eliminate dishonest entrepreneurs while legitimizing honest ones.

The growth in subcontracting has generally alarmed trade unions. The strongest reaction often comes from unions representing low-paid and vulnerable workers. There are also concerns regarding fragmentation of labour relations and loss of union membership through subcontracting. Many unions perceive subcontracting businesses as being frequently hostile to trade unionism. Trade unions are also preoccupied with the need to control and regulate the phenomenon in order to provide the workers engaged with adequate legal and social protection. Their traditional misgivings towards contract labour are often exacerbated by the fact that their influence in subcontracting businesses is low due to the difficulties of recruitment and retainment of membership there. The reluctance of such businesses to recognize unions and engage in collective bargaining is not conducive to a more positive attitude on the part of trade unions towards contract labour either.

However, where subcontractors adopt a more positive attitude towards trade unions, the latter respond in kind. There are examples of trade union efforts to organize contract workers and negotiate their conditions of work, including wages, with employers. For instance, employees of temporary work agencies have been unionized in Denmark, Finland and Sweden. In Sweden, a collective agreement concerning the temporary work agencies operating in the service and office sector was concluded in 1988. There also are cases of trade unions launching recruitment and recognition initiatives with subcontractors (for example, in cleaning services in the United Kingdom).

In many countries, debates between the social partners on the future of contract labour often concentrate on such issues as how far this pattern of workforce utilization should be tolerated and recognized, how to balance the workers' and employers' interests, and to what extent public authorities can intervene in this area. In Pakistan, for example, the trade unions used to consider that contract labour should be abolished on the grounds that it is abused in order to avoid ensuring adequate labour protection. The employers were of a different opinion, claiming that the lack of protection enjoyed by the workers concerned stems mainly from the non-enforcement of certain rights already granted to such workers by law.[27] In 1988, this issue was one of the items for deliberation at the Pakistan Tripartite Labour Conference. A tripartite subcommittee established in 1989 approved the draft Bill on contract labour prepared by the Ministry of Labour, Manpower and Overseas Pakistanis. Further deliberations on the subject, which took place in the course of 1994 within the Task Force on Labour set up by the Government and its specially established subcommittee on contract labour, eventually ended in the release of a set of recommendations on the desirability of enactment of a separate law on contract labour. The law would cover both public and private sector enterprises, would provide for registration of enterprises employing

contract workers and licensing of contractors, and would lay down respective responsibilities of the user enterprises and subcontractors.

**Notes**

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[3] For details see P. Egger and P. Poschen (eds.): *Labour contracting and employment in construction, forestry, plantations and manufacturing* (Geneva, ILO: forthcoming).

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[10] ILO: *General report*, Report I, Forestry and Wood Industries Committee, Second Session, Geneva, 1991, pp. 110-117; see also P. Egger and P. Poschen (eds.), op. cit., p. 4.

[11] See ILO: *Safety and related issues pertaining to work on offshore petroleum installations*, Sectoral Activities Programme, TMOPI/1993, Tripartite Meeting, Geneva, 1993, pp. 8-11 and 24-25.

[12] Lee Kiong Hock and A. Sivananthiran, op. cit., pp. 15-16 and 33.

[13] J. Birch: *Employed or self-employed? Contract labour in the British construction industry*, Sectoral Activities Programme working paper SAP 2.38/WP.63 (Geneva, ILO, 1993), pp. 1-3.

[14] B. B. Patel: "Contract labour in India: Pattern and issues", in P. Egger and P. Poschen (eds.), op. cit., p. 6.

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[16] G. Standing: *The growth of external labour flexibility in a nascent NIC: Malaysian labour flexibility survey*, Labour Market Analysis and Employment Planning, World Employment Programme Research, Working Paper No. 35 (Geneva, ILO, 1989), p. 27.

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[18] E. Silverstein: *Contract labor in the United States*, report submitted for the ILO research project on contract labour, July 1995, p. 5.

[19] W. Däubler: *Contract labour: German report*, report submitted for the ILO research project on contract labour, July 1995, p. 8.

[20] P. E. Leighton: *Contract labour in UK: Law and practice*, report submitted for the ILO research project on contract labour, May 1995, pp. 5-8.

[21] ILO: *World Labour Report 1995*, No. 8 (Geneva, 1995), p. 63.

[22] See J.-Y. Lesueur and P. Plane: *Les services publics africains à l'épreuve de la réhabilitation: une évaluation économique et sociale*, étude réalisée à la demande du Bureau International du Travail et du

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[27] For details see: *Contract labour*, Chapter II of the Report of the Task Force on Labour of 19 July 1994, Ministry of Labour, Manpower and Overseas Pakistanis (Labour Wing), pp. 21-50.

## CHAPTER III

# COVERAGE BY GENERAL LABOUR LAW AND COLLECTIVE AGREEMENTS

Recourse to most forms of contract labour implies an intention by one or both parties not to submit the relationship between the user enterprise and the workers concerned to general labour law. Thus, the first means by which a country can seek to provide protection to the workers concerned is extending the application of general labour law to those contract workers for whom it is deemed that such protection is necessary. This has been done in many countries by broadening the definition of "employees", who are covered by general labour law, to include certain categories of contract workers, whether as a result of the case-law of the courts or by explicit statutory extension of the law to such persons.

### JUDICIAL CASE-LAW

The general rules applicable to the employment relationship deriving from common law and statutory law define their scope by general reference to the employment relationship, that is the relationship between employer and employee. The content of this relationship and the definition of "employer" and "employee" have generally been left to the courts to work out through case-law, having regard to the immense variety of factual situations that exist. It is through the development of this case-law, and the criteria permitting the courts to identify an employment relationship, that the courts in many countries have been able to extend the scope of both common-law and statutory protection of the employment relationship to certain types of contract labour.

Thus the general principle of freedom of contract, one of the pillars of the general law of contract, has been qualified in practice by the courts, which do not allow the parties to give a commercial character to the contract if the courts consider that its content is in substance an employment contract. Thus the intent of the parties is not necessarily determining and the courts will look at the factual situation of the relationship between enterprise and worker to identify the nature of the relationship.

By and large, this "fact-finding" analysis evolves simultaneously in two major directions. On the one hand, the relationship between the user enterprises and the contract workers is scrutinized in order to see how much autonomy the latter have. On the other hand, the judicial bodies also look at the nature of the relationship which actually exists between the workers concerned with the user enterprises and the subcontractors, respectively.

As regards recognition of the existence of an employment relationship, in common law with respect to this subject, which has its historical origins in

nineteenth-century English judge-made law, the "master-servant" relationship was viewed as a branch of the law of contract based on the assumption of equality of the parties. The derivation from the law of contract meant that the mutual rights and obligations of the parties became the focus for the definition of the nature of the relationship. The fundamental term of a contract was the performance of work in exchange for wages. Disobedience of the master's reasonable commands was a fundamental breach of the contract entitling the employer to terminate the contract. Therefore, the test of direction became all-important in the characterization of a contract of employment. Initially, this kind of dependency was simply understood as a direct control exercised by an employer over the work performed by its employees: where the user enterprises contracted for a result only, the subcontractors were regarded as independent; whereas, where the user enterprises directed the performance of work, they were regarded as employers. However, with technological and organizational advances many employers could no longer directly supervise their more highly trained or specialized employees. Moreover, it was thought that lack of such control and supervision might be not so much an indicator of an independent contract or otherwise, as an indicator of an efficiently organized business in which financial incentives and good relations with responsible, carefully selected staff take the place of close supervision. As a result, the test of actual exercise of control over the employees' work gave way to the test of the right to control, i.e. lawful authority to command in so far as there is scope for it.[1]

A telling example of the difficulty of applying this test is the case of homeworkers, whose conditions of employment have deviated significantly from what has been traditionally regarded as an employment relationship,[2] with control and subordination becoming variable owing to the often remote physical distances between the user enterprises and places where the work is actually performed. This has necessitated a reconsideration by national judiciaries of the control and subordination test in relation to homeworkers, either by interpreting it much more broadly (as has happened in Italy, for example, where it has been replaced by the "para-subordination" test) or by using other tests.

As a result, the "business" test (whether the worker is in business on his or her own account) and the "integration" or "organization" test (whether the worker performs the duties as an integral part of the business of the user enterprise) have achieved some currency from time to time. In the first test, the emphasis is on the worker's activities; in the second, it is on the employer's.

Therefore, the existence of control and subordination, whilst significant, has not become the sole criterion used by the national judiciaries to determine whether or not a relationship is one of employment. Further developments in work organization, increased specialization of production, and growing diversity of contractual arrangements between the market players have resulted in a further development of judicial doctrine on the subject.

Over the years, a number of other indicia have been developed in different countries, in addition to (or in specification of) the above-mentioned "control", "business" and "integration" (or "organization") tests, in determining whether a contract arrangement is a commercial or employment contract. The following tests are variously used by Argentina, Australia, Belgium, Canada, Italy, Japan, the Philippines, Portugal, Sweden, Thailand, the United Kingdom and the United States, according to the national reports recently prepared for the ILO on contract labour: (i)

whether the contract worker works exclusively for a particular user enterprise; (ii) whether the user enterprise is the exclusive supplier of necessary resources, tools and equipment; (iii) whether the user enterprise instructs contract workers on how to do the work; (iv) who chooses the place where work is to be performed or services provided — the user enterprise or the contract worker; (v) whether the subcontractor undertakes any risk in the business sense or, alternatively, has any expectations of profits associated with the delivery of his or her services as distinct from a fixed commission; (vi) the extent of integration of the contract worker's work into the user enterprise's business; (vii) the extent to which the work performed by the contract worker requires special skills; (viii) who pays fiscal and social security contributions — the user enterprise or the subcontractor; (ix) whether the contract workers do the same work as that normally performed by the regular employees of the user enterprise; (x) whether the work performed or services provided by the contract workers are stipulated as an activity or as a result ("final product"); (xi) who remunerates the contract workers — the user enterprise or the subcontractor; (xii) who defines the hours of work and rest of the contract workers; (xiii) regularity and continuity of performance of the work; (xiv) to whom the contract workers report; (xv) whether the user enterprise trains the contract workers; (xvi) whether the user enterprise can sanction the contract workers.

No single indicator is decisive *per se*. The totality of indicia used in a particular country are normally evaluated together. However, "control" (or "subordination") is frequently given a higher priority than other indicia since it is considered in many countries to be the very hallmark of an employment relationship. The greater the degree of control by the user enterprise over how the work is done, the more likely it is that employee status of the workers involved will be recognized, even though the subcontractor carries a substantial risk in relation to earnings.

However, some experts have remained sceptical of the efficiency of this kind of "multi-factor" test. They have emphasized that under such a test the relationship itself remains largely undefined as a legal concept, since the relevance of different criteria may vary according to the circumstances. Therefore, it is believed that various formulations of tests are no more than a determination of the degree of dependency (or independence), for which there is no exclusive measure. It has been emphasized that various factors are not exclusive or inclusive but are merely extensions along the same continuum of dependency, which certainly includes control and subordination. The distinction between an independent contracting and an employment relationship lies in facts, not in law. Some critics of the "multi-factor" test even say that it has done nothing more than provide employers who wish to escape liability with a series of indicia to use as a blueprint for evasion.

An example of failure of the "multi-factor" test is the hearing in the Full Court of the Federal Court of Australia of the case concerning the Troubleshooters labour supply agency, mentioned above in Chapter I, versus the Building Workers' Industrial Union. When it applied this "multi-factor" test for the purpose of defining the status of the workers supplied through Troubleshooters, the Court found that the indicia of which the test was composed were split: the workers were directed and controlled by the user enterprises but were paid by the agency. Having placed weight on the "control" test and having found that control over those workers did not reside in the agency, the Court held that payment of wages was not enough to recognize the

workers concerned as employees of the agency (they had not claimed to be employees of the user enterprise).[3]

Therefore, the issue of dependency still remains central in determining whether or not a particular subcontracting arrangement should be regarded as an employment relationship. This was also reaffirmed in the course of the recent ILO standard-setting activity concerning home work when the issue of dependency was repeatedly raised in discussions focusing on the problem of definitions that directly concern the employment status of homeworkers.[4]

The identification of an employer is also of considerable importance in so far as protection of the rights, both individual and collective, of contract workers is concerned. In order to resolve the issue of who the employer is for the purpose of the employment contract, the judiciary applies the test for "employee" status described above and determines whether it is the user enterprise who exercises the requisite control and economic domination over the workers concerned, or the subcontractor providing these workers, or both. Accordingly, decisions are taken to identify either the user enterprise or the subcontractor, or both, as employers of these workers. In the latter case, decisions are normally grounded on employment legislation containing provisions for recognition of two or more employers as a common employer, where they exist (in Canada, for example).[5] On the other hand, the lack of sufficient elements of dependency may result in neither being recognized as employer, leaving the workers concerned in an independent situation.

## Statute

While, in most countries, the courts have in effect extended the protection of the employment laws to certain kinds of contract labour that entail relations of dependency similar to those characterizing the employment relationship, some statutes have explicitly included certain kinds of contract labour in the definitions of the persons or relationships covered, often also referring to the concept of dependency.

Where legal policy seeks to assimilate contract workers to employees for various reasons, two legal techniques are normally utilized to include these workers within the definition of an "employee" or otherwise extend protection to them: spelling out certain criteria according to which the workers are also granted employee status, and providing for a list of contractual arrangements in which the workers engaged are regarded as employees.

The Québec Act of 1990 respecting labour standards (Canada), for example, defines an employee as "a person who works for an employer and who is entitled to a wage", including those who: (i) undertake to perform specified work for a person within the scope and in accordance with the methods and means determined by that person; (ii) undertake to furnish, for the carrying out of the contract, the material, equipment, raw materials or merchandise chosen by that person and to use them in the manner indicated by him; and (iii) keep, as remuneration, the amount remaining from the sum received in conformity with the contract, after deducting the expenses entailed in the performance of that contract (s. 2).

Sometimes a distinction is made between the terms "employee" and "worker", the latter being given a wider interpretation and encompassing not only those who work under contracts of employment but also those who work under any other contracts

whereby they undertake "to do or perform personally any work or services for another party to the contract who is not a professional client" of theirs (s. 296 of the Trade Union and Labour Relations (Consolidation) Act 1992 of the United Kingdom).

The Organic Labour Act of 1990 of Venezuela gives priority to the issue of dependency, providing for a definition of an independent worker as a "natural person habitually earning a living from his or her work without being in a situation of dependency with regard to one or more employers" (s. 40).

However, frequent confusion between labour-only contracting and job contracting in practice seems to have been a major stumbling block preventing legislatures in many other countries from giving a more precise definition of an "employee" as opposed to an "independent subcontractor" or a "genuinely" self-employed person. Moreover, some experts even consider that legislation has a very limited potential in this regard. It has therefore been suggested that instead of trying to define an "employee" comprehensively, the legislature should direct the judiciary "to have regard to the substance and practical operation of the parties' relationship and not merely the contractual terms (if any) agreed between them".[6]

The coverage of contract labour workers by collective bargaining legislation and by provisions of the relevant collective agreements depends on the employment status of such workers. For those who may not qualify as employees under traditional statutory or common-law tests but are also not fully economically independent subcontractors, the collective bargaining legislation of some countries has provided for a definition of a "dependent subcontractor".

The Canada Labour Code is illustrative in this regard. It includes dependent contractors in the definition of an employee for the purpose of collective bargaining rights and provides for a non-exhaustive list of those who should fall under the category of dependent contractors. The latter includes:

(a) the owner, purchaser or lessee of a vehicle used for hauling, other than on rails or tracks, livestock, liquids, goods, merchandise or other materials, who is a party to a contract, oral or in writing, under the terms of which he is:
  (i) required to provide the vehicle by means of which he performs the contract and to operate the vehicle in accordance with the contract, and
  (ii) entitled to retain for his own use from time to time any sum of money that remains after the cost of his performance of the contract is deducted from the amount he is paid, in accordance with the contract, for that performance,

(b) a fisherman who, pursuant to an arrangement to which he is a party, is entitled to a percentage or other part of the proceeds of a joint fishing venture in which he participates with other persons, and

(c) any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that he is, in relation to that other person, in a position of economic dependency on, and under an obligation to perform duties for, that other person (s. 3).

In some other countries, collective bargaining legislation, while it does not use the term "dependent contractors", extends the definition of a "worker" to such contractors and thus grants them collective bargaining rights. One example is the Swedish Act of 1976 respecting co-determination at work, which extends the term "worker", for the

purposes of the Act, to a person who does work for another person and, when so doing, is not employed by him but has essentially the same status as an employed person. The person for whom the work is done shall in such a case be regarded as the employer (s. 1). Provisions of this kind are of relevance mainly in cases where a group of such "dependent contractors" gets together and negotiates with the user enterprises the conditions under which work is done or services provided.

However, economic dependency alone does not determine the employee status of the subcontractors involved. There are many bona fide businesses that are dependent on other businesses yet cannot properly be said to have entered into an employment relationship. All the economic realities of a particular contractual relationship must be carefully scrutinized. In this kind of testing "whose business it is", the subcontractor's or the user enterprise's, legislation has frequently left it up to case-law to decide.

Contract workers can also be given the status of employee, and thus be covered by general labour law and by collective agreements in force in the user enterprises, through the identification of the employer's side to a contract labour relationship. The legislation of a number of countries provides for various definitions aimed at either clarifying the employer status of the user enterprises, subcontractors and intermediaries, or assigning employer responsibilities to them.

As far as the user enterprises, frequently referred to in legislation as "principals" or "users", are concerned, they are generally defined as legal entities or individuals that in the course of or for the purpose of their trade or business contract out the whole or any part of their work. In the Employment Act 1968 of Singapore, a "principal" is defined as a "person who, in the course of or for the purpose of his trade or business, contracts with a contractor for the supply of labour or for the execution by or under the contractor of the whole or any part of any work undertaken by the principal" (s. 2). Sometimes such definitions directly address the relationship between the user enterprise and the contract workers. For example, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 of Australia define a "principal", in relation to a contract worker, as a person for whom the contract worker does work pursuant to a contract between the employer of the contract worker and the person.[7]

The terms "contractor" and "subcontractor" have also been given different definitions depending on whether they are applied to commercial contracting arrangements, on the one hand, or to labour contracting, on the other. For instance, the Organic Labour Act of 1990 of Venezuela defines contractors as "natural persons or bodies corporate that contract to perform work or services with their own resources . . ." (s. 55).

Sometimes these definitions are combined. In this regard, the Employment Act 1955 of Malaysia (as amended in 1981) provides an example of an extensive set of definitions related to contract labour arrangements. It defines: (i) "principal" as a person who contracts with a contractor for the execution by or under the latter of the whole or any part of any work undertaken by the principal; (ii) "contractor" as a person who contracts with a principal to carry out the whole or any part of any work undertaken by the principal in the course of or for the purposes of the principal's trade or business; (iii) "subcontractor" as a person who contracts with a contractor for the execution by or under the subcontractor of the whole or any part of any work undertaken by the contractor for his principal, and includes any person who contracts with a subcontractor to carry out the whole or any part of any work undertaken by the

subcontractor for a contractor; (iv) "subcontractor for labour" as a person who contracts with a contractor or subcontractor to supply the labour required for the execution of the whole or any part of any work which a contractor or subcontractor has contracted to carry out for a principal or contractor, as the case may be (s. 2).

The Labour Code of Haiti interprets differently the terms "contractor" and "subcontractor" in terms of the employer status of those to whom they refer. It defines a "contractor" as a person who engages workers to carry out work for the user enterprise, "with or without means provided by the latter", and thus as an employer (s. 19), whereas a "subcontractor" is identified with an "intermediary", meaning "any third party to whom a contractor commits a task and who causes it to be carried out by one or more persons, with means provided by, and under the control or supervision of, the contractor" (s. 26).

Other legislation endeavours to define independent subcontractors and thus distinguish them from those who should be regarded as employees. The Labour Code of Colombia gives a definition of an "independent contractor", deemed to be a genuine employer and not an employer's representative or intermediary, as a person who undertakes to carry out any job or perform any service for a third party in return for a fixed price, assuming all the risks involved, and undertakes to do so with his or her own resources and enjoys technical and managerial freedom and independence (s. 34). One of the few recent attempts to draw a distinction between independent individual contractors and employees was the French Act of 11 February 1994 respecting initiative and individual enterprise (*loi relative à l'initiative et à l'entreprise individuelle — "loi Madelin"*).[8] It provides that individual persons appropriately registered, including for the purposes of social security and family benefit coverage, are presumed not to be in an employment relationship in the course of the activities for which they have been registered. However, the existence of an employment relationship can be recognized should such persons provide the user enterprises with work or perform services, directly or through an intermediary, under the conditions which place such individual subcontractors in a permanent legal subordination to the latter (s. L. 120-3 of the Labour Code, as amended on 11 February 1994).

The legislation of some other countries contains examples of definitions of an "intermediary". The Labour Code of Colombia, for example, defines an "intermediary" as an employer's representative, and as such a person committing the latter in dealings with the workers concerned (s. 35). It defines a "simple intermediary" as a "person who contracts for the services of other persons for the performance of work for the benefit and exclusively on behalf of an employer". Where a person making a contract of employment fails to state that he or she is acting as a "simple intermediary" and indicate the name of the employer, such a person shall be jointly and severally responsible with the employer in all matters connected with the contract (s. 34).

The Federal Labour Act of 1969 of Mexico defines an "intermediary" as a person who contracts or intervenes in contracting for the services of another person or other persons for the performance of work for an employer. Such intermediaries are not allowed to receive any remuneration or commission deducted from the wages of the workers concerned. The user enterprises recruiting workers through intermediaries must assume all the obligations arising out of the Act towards those workers. This makes the status of intermediaries different from that of the established enterprises contracting for work with their own resources, "the latter being sufficient to meet their

obligations towards their workers", recognized by the Act as employers of such workers (ss. 12-14). Therefore, contracting enterprises which do not have enough resources of their own to fulfil employment obligations towards the workers engaged in contracting arrangements with the user enterprises are not recognized as employers of such workers. The purpose of such provisions is obvious, namely to exclude the possibility of leaving the workers concerned without a clearly identified employer, who might be either the user enterprise (where a workforce is employed through intermediaries or through the enterprises without "sufficient resources of their own"), or the contracting enterprises having sufficient resources to meet employer obligations towards the workers engaged.

A distinct interpretation of the term "intermediary" has been given by the Organic Labour Act of 1990 of Venezuela. Unlike the Labour Code of Mexico, it stipulates that when an enterprise, establishment, undertaking or business is carried on through an intermediary, both the intermediary and the person on whose account it is carried on are deemed to be employers (s. 49). An intermediary is defined as a person who in his or her own name and on another person's account employs the services of one or more workers; the intermediary shall be liable for any obligations arising by law or contract towards such workers (s. 54).[9]

Some other legislation applies the term "subcontractor" to individual intermediaries. For example, the Labour Code of the Overseas Territories of France, which was adopted in 1952 and had a significant effect on the legislation of these countries after they became independent, defines *tâcheron* as "a person who, himself recruiting the necessary workers, enters into an oral or written contract with a contractor [meaning, here, the user enterprise] to carry out specified work or to furnish specified services for an agreed price" (s. 64). In the national legislation, however, the definition of a *tâcheron* is spelled out in a more explicit way. For example, the Mauritanian Labour Code describes it as an intermediary entrusted by the user enterprise "with the task of recruiting workers and, where appropriate, of supplying them with tools and raw materials for the performance of a specified job". A *tâcheron*, while regarded by the Code as an employer, is prohibited from exploiting his or her employees, meaning practices whereby he or she "arranges for any remuneration payable to the workers to be remitted directly or indirectly to him in return for their recruitment or whereby he recruits them for work which he knows will have to be done in conditions contrary to the relevant laws, regulations, collective agreements and established customs" (ss. 34a and 34b). The Labour Code of Senegal defines a *tâcheron* as a master workman who occasionally recruits workers and provides them with tools and raw materials to carry out a specified piece of work, either directly for the person who ordered the work to be done, or as an intermediary (s. 75).

## Coverage by collective agreements

Whether or not contract workers are covered by the provisions of collective agreements in force in the user enterprises depends to a great extent on whether or not the latter are regarded as employers of such workers. In countries where disputes over the interpretation and enforcement of collective agreements are handled by arbitrators or arbitration bodies, certain criteria have been worked out through arbitration practices for this purpose. The most frequently referred to are the following: (i) who exercises effective control and direction over the workers' activities; (ii) who bears

the burden of remuneration; (iii) how remuneration is paid, according to the work or services rendered or according to the skill and job position of the workers engaged; (iv) who has effective decision-making power in respect to hiring, discipline and dismissal; (v) who the contract workers perceive to be their employer; (vi) who — the user enterprise or the subcontractor — intends to be the real employer.

When deciding to recognize the user enterprise as an employer, arbitration bodies also take account of the effects which such a decision might have on the workers concerned. Such effects are not necessarily always positive for these workers. For instance, having been recognized as the employees of the user enterprises, they may risk losing important statutory benefits conditional on continuous employment with a single employer (as is the case in Canada, for example). In such cases, arbitration bodies may either refrain from holding the user enterprise to be the employer of the contracted in workers or identify the former as an employer, acknowledging simultaneously a *de facto* employment for indefinite duration of the workers concerned, differing little from the position of the user enterprise's regular employees; such contract workers can expect to accrue significant seniority for statutory purposes.[10]

Moreover, even if the contract workers are held to be employees of the subcontractor, they may none the less be covered by the user enterprise's collective agreement under the "common employer" provisions of the collective bargaining legislation. In Canada, for example, labour relations boards are granted the discretion to deem two or more separate employers to be a single employer for the purposes of the collective agreement and the legislation where "associated or related activities, businesses, trades or undertakings are or were carried on, whether or not simultaneously by or through one corporation, individual, firm, syndicate or association, or any combination thereof, under common control or direction".[11] Such provisions potentially allow for the user enterprise and the subcontractor to be treated as one employer so that the latter would be bound by the former's collective agreement in respect of dealings with its own employees who are assigned to the user enterprise. Case-law of labour arbitration bodies has resulted in certain criteria for the application of provisions of common employer declaration, including the following: (i) contract workers perform work related to a core business of the user enterprise; (ii) the contractor does not retain effective control over its employees; (iii) the contractor does not have effective authority over the kinds of services that are provided; (iv) there is corporate connection between the two organizations.

In the United States, the National Labor Relations Board and the courts have developed a similar approach to the application of the law governing collective bargaining. First, the concept of an "allied employer" was developed for the purpose of excluding a union representing employees of a subcontractor from the general prohibition of secondary boycotts.[12] According to it, a union can resort to a secondary boycott against a user enterprise should the latter be recognized by the National Labor Relations Board and the federal courts as an "allied employer" in relation to the subcontractor. This recognition is based on the consideration of the extent to which the two enterprises exhibit: (i) interrelation of operations; (ii) centralized control of labour relations; (iii) common management; and (iv) common ownership or financial control. Secondly, the courts have also found, applying the same four-factor test, that a subcontractor and a user enterprise are actually a "single enterprise". This allows a union to bargain on behalf of a small group of subcontracted employees even if the

subcontractor is too small by itself to qualify as an employer under the National Labor Relations Act. Lastly, the courts have identified circumstances in which the user enterprise exercises sufficient control over the employer-employee relationship of a subcontractor to consider them to be "joint employers" for collective bargaining purposes. Applying a less stringent test than that used to find "allied employers" or a "single enterprise", the courts articulate the question of whether the user enterprise possesses sufficient control over the work performed by the subcontractor's employees to qualify as a "joint employer". Among the factors considered in this inquiry are the degree of the user enterprise's control over (i) hiring and firing, (ii) discipline of employees, (iii) pay, insurance and records, (iv) supervision, and (v) participation in the collective bargaining process.[13]

Sometimes the coverage of contract workers by collective agreements may also be affected by the "successor rights" provisions spelled out in collective bargaining legislation in some countries (for example in Canada). These provisions, aimed at preserving bargaining rights of the workers affected, envisage that if an enterprise sells, transfers or otherwise disposes of all or a part of its business to another enterprise, the latter is bound by the collective agreement in force in the former. As regards the application of the successorship rules to contract labour arrangements, this means that the more dependent the subcontractor is on the user enterprise the more likely it is that the workers of this subcontractor will be covered by the provisions of the collective agreement in force in the user enterprise. However, the general policy of the Canadian labour boards is to apply the successorship provisions sparingly to labour subcontracting. This is because the successorship provisions were not specifically designed to regulate subcontracting and because of the widespread understanding in the Canadian industrial relations community that labour subcontracting is supposed to be regulated privately by collective bargaining, not by labour boards. Therefore, successorships are the exception, not the norm in subcontracting situations.[14]

### Definitions established for statistical purposes

The International Classification of Status in Employment (ICSE-93),[15] drawn up by the Fifteenth International Conference of Labour Statisticians convened by the Governing Body of the International Labour Office and held in Geneva from 19 to 28 January 1993, includes certain definitions which differ from those already examined above in that while the latter were elaborated mainly for regulatory purposes, the former were specifically geared to statistical purposes. None the less, the ICSE-93 definitions may be of significant value in evaluating the potential for drawing up internationally accepted definitions relevant to contract labour arrangements, especially in view of the possible establishment of an international standard or standards on the subject.

First, it defines "employees" as those workers who have "paid employment jobs" where the incumbents hold explicit (written or oral) or implicit employment contracts which give them a basic remuneration which is not directly dependent upon the revenue of the unit for which they work (this unit can be a corporation, a non-profit institution, a government unit or a household). Some or all of the tools, capital equipment, information systems and/or premises used by the incumbents may be owned by others, and the incumbents may work under direct supervision of, or

according to strict guidelines set by the owner(s) or persons in the owners' employment. Persons in "paid employment jobs" are typically remunerated by wages and salaries, but may be paid by commission from sales, by piece-rates, bonuses or in-kind payments such as food, housing or training. "Regular employees" are defined as those with stable contracts for whom the employing organization is responsible for payment of relevant taxes and social security contributions and/or where the contractual relationship is subject to national labour legislation (Paras. 6 and 8.1). The ICSE-93 defines "outworkers" as those: (i) who hold explicit or implicit contracts of employment under which they agree to work for a particular enterprise, or to supply a certain quantity of goods or services to a particular enterprise, by prior arrangement or contract with that enterprise; (ii) but whose place of work is not within any of the establishments which make up that enterprise. These workers may be classified as being in "paid employment" or in "self-employment", according to the specific terms of their contract. They may be classified as "employers" if they engage other workers (Para. 14 (h)).

Second, the ICSE-93 defines "own-account workers" as those who, working on their own account or with one or more partners, hold "self-employment jobs" (i.e. jobs where the remuneration is directly dependent upon the profits and where the incumbents make the operational decisions affecting the enterprise, or delegate such decisions while retaining responsibility for the welfare of the enterprise), and have not engaged on a continuous basis any "employees" (Paras. 7 and 10.3).

Third, "employers", in the context of self-employment, are defined by the ICSE-93 as those who, working on their own account or with one or a few partners, hold the type of job defined as a "self-employment job" (see above), and, in this capacity, have engaged on a continuous basis one or more persons to work for them in their business as employees (Para. 9.2).

Lastly, the ICSE-93 also defines "contractors" as those who: (i) have registered with the tax authorities (and/or other relevant bodies) as a separate business unit responsible for the relevant forms of taxes, and/or who have made arrangements so that their employing organization is not responsible for relevant social security payments, and/or for whom the contractual relationship is not subject to national labour legislation applicable to "regular employees", for example; but who (ii) hold explicit or implicit contracts which correspond to those of "paid employment" (see above). According to national circumstances, "contractors" may be classified as in a "self-employment job" or as in a "paid employment job" (Para. 14 (i)).

The adoption of the ICSE-93 has resulted in the recognition of the growing diversity in the work situation of workers and of the need to develop technical guidelines as a basis for strengthening national statistical programmes and enhancing international comparability of statistics. It has also been recognized that on the basis of implementation experience the ICSE-93 might undergo further modifications necessary to adapt it to rapidly developing labour market realities.

**Notes**

[1] See L. de Plevitz: *Contract labour in Australia*, report submitted for the ILO research project on contract labour, Mar. 1995, p. 13.

[2] See for details ILO: *Home work*, Report V (1), International Labour Conference, 82nd Session, Geneva, 1995, pp. 28-48.

[3] See for details E. Underhill and D. Kelly: "Eliminating traditional employment: Troubleshooters Available in the building and meat industries", in *Journal of Industrial Relations* (Industrial Relations Society of Australia), Vol. 35, No. 3, Sep. 1993, pp. 398-423.

[4] See for details ILO: *Home work*, Report V (2), International Labour Conference, 82nd Session, Geneva, 1995, pp. 17-39.

[5] See G. England: *Contract labour in Canada*, report submitted for the ILO research project on contract labour, 1995, pp. 23-26.

[6] See A. Stewart: *Atypical employment and the future of labour law*, paper presented at the Australian Law Teachers' Association conference held in July 1992, QUT, Brisbane, Australia, p. 17.

[7] L. de Plevitz, op. cit., p. 22.

[8] For a detailed analysis of the Act see for example M. Laroque: "Présentation introductive de la loi du 11 février 1994 relative à l'initiative et à l'entreprise individuelle"; J.-E. Ray: "De Germinal à Internet. Une nécessaire évolution du critère du contrat de travail"; F. Doroy: "La vérité sur le faux travail indépendant"; G. Lyon-Caen: "Où mènent les mauvais chemins", in *Droit Social*, No. 7/8, July-Aug. 1995, pp. 631-633, 634-637, 638-641, 647-650, respectively.

[9] ILO: *Labour Law Documents*, 1991/2, p. 60.

[10] G. England, op. cit., pp. 21-23.

[11] ibid., p. 23.

[12] A "secondary boycott" means a boycott "intended to force a second or secondary employer to refrain from doing business with a primary employer with whom the union has a dispute . . ." (W. B. Gould: *A primer on American labor law*, 2nd ed. (MIT Press, Cambridge, Massachusetts, 1986), pp. 14-19, 53-54).

[13] See E. Silverstein: *Contract labor in the United States*, report submitted for the ILO research project on contract labour, July 1995, pp. 45-46.

[14] G. England, op. cit., pp. 26-29.

[15] *Official Bulletin* (Geneva, ILO), Vol. LXXVI, 1993, Series A, No. 3, pp. 188-193.

## CHAPTER IV

# SPECIFIC REGULATION OF CONTRACT LABOUR

Various methods have been used to regulate contract labour practices for the purpose of protecting the interests of the workers involved. The previous chapter reviewed the extent to which general labour and collective bargaining law and collective agreements have been applied to certain forms of contract labour through the extension of definitions by the courts or by the laws or agreements themselves. This chapter reviews the special rules developed by legislation and collective agreements to regulate certain forms of contract labour.

Contract labour is a form of relationship on the borderline between commercial and labour law, which may both be applicable to this specific pattern of contractual relationship. Commercial (civil) legislation normally addresses the issues relating to job contracting in so far as the commercial relationship between non-subordinated and economically independent businesses is concerned. Labour legislation, on the other hand, focuses on the major characteristics of the employer-employee relationship: subordination and dependency between the parties concerned. Therefore, while commercial legislation is aimed at establishing a statutory framework for business activities involving independent economic entities, labour legislation (both employment and collective bargaining legislation) is mainly targeted at protecting the interests of employees, whose dependence on employers stems from the very nature of the employment relationship. The problem of contract labour concerns whether and how to regulate a phenomenon that may have characteristics of both types of relationship, or that in certain cases, while retaining essential characteristics of the second, are given some of the formal attributes of the first. This must be done so as not to undermine the viability of either type of relationship. The problem arises from the fact that often the characteristics of contract labour are not clear, or are ambiguous, and that definitions must be formulated that clearly isolate the phenomenon to be protected from the broader commercial phenomena that do not require such protection. If this is not done appropriately, there is a risk, on the one hand, of not providing appropriate protection to persons whose state of dependency makes this necessary or, on the other, of undermining normal commercial arrangements.

There are also examples of the role played by collective bargaining and contractual arrangements between user enterprises and subcontractors. Public authorities have their part to play in controlling such practices with a view to retaining the positive aspects of contract labour, on the one hand, and eliminating possible abuses, on the other. In some countries, employers engaged in contract labour arrangements have drawn up ethical codes of conduct spelling out certain rules regulating their activities. An example of this is the ethical codes elaborated by the temporary employment agencies operating in the commercial and office sectors of Denmark and Norway.

The main objective to be accomplished in regulating different forms of contract labour is twofold: to retain the elements of contract labour deemed to be positive and to provide the workers thus employed with the necessary social protection. Different measures have been taken in this regard by some countries. The regulation of contract labour arrangements is mainly targeted at excluding the possibility of exploitation of the workers concerned and at preventing those who actually employ these workers, that is user enterprises and subcontractors, from evading employer responsibilities under labour and social security laws. Attempts have also been made in certain countries to protect jobs and conditions of work of regular employees of the user enterprises from being eroded by contract labour arrangements. They include the following measures: (i) statutory prohibition or elimination of certain types of contract labour arrangement; (ii) authorization, registration or licensing of certain labour market activities involving contract labour elements; (iii) administrative control over contract labour arrangements through labour inspection; (iv) guarantee of equal treatment between contract workers and employees of the user enterprises; (v) requirement that contracts between subcontractors and user enterprises state clearly the conditions of work of the workers concerned; (vi) assignment of legal responsibility for obligations of the employer regarding wages, working conditions, safety and health, and/or social security to the user enterprises or to the subcontractors, or to both.

These measures are provided for either in legislation (both employment and collective bargaining legislation) or through voluntary arrangements between the parties (bipartite or tripartite consultation/negotiation arrangements between the social partners, collective bargaining, and contracts between the user enterprises, subcontractors and the workers concerned).

## Legislation

### *Statutory prohibition or restriction*

One approach to regulating certain types of contract labour arrangement in a number of countries is prohibition. Such prohibitions refer mainly (either implicitly or explicitly) to labour-only contracting. Sometimes, however, statutory prohibitions are framed in a more general way, implying their application to both major types of contract labour arrangement, that is to labour-only and certain kinds of job contracting.

Such prohibitions are aimed at preventing the workers engaged from being exploited by the subcontractors and have a long history in labour law. They date back to the middle of the last century, when French legislation recognized exploitation by labour subcontractors (*marchandeurs* or *tâcherons*) as unfair and abolished it.[1] The Labour Code of *France* has retained this principle and *implicitly* rules out labour-only contracting aimed at exploitation of the workers engaged while considering as unlawful "any profit-making operation connected with the supply of manpower, the effect of which is to cause prejudice to the employee concerned or to evade the application of the provisions of any law, regulation or collective agreement, or to engage in subcontracting on a piece-work basis (*marchandage*)" (s. L. 125-1).

The Italian Act No. 1369 of 23 October 1960, which was aimed at disclosing and eliminating attempts to pass off labour subcontracting as commercial contracting for

services, prohibits the contracting out of work of any kind to subcontractors where the capital, machinery or plant used in the work ordered is supplied by the user enterprise, even in cases in which the subcontractors pay the user enterprises for its use. Legitimate subcontractors are those who assume full responsibility for the organization and supervision of work. Labour-only subcontractors are therefore implicitly prohibited. The Act imposes on legitimate subcontractors specific obligations regarding the protection and welfare of the workers thus employed. Penalties for infringements are imposed on both the user enterprises and the subcontractors; workers found to have been employed in violation of the provisions of this Act are deemed to be the employees of those enterprises that actually benefit from their work, i.e. of the user enterprises.

The legislation of the Philippines, which gives a rare example of how both terms "labour-only contracting" and "job contracting" have received legal recognition and been distinguished from each other, *explicitly* prohibits labour-only contracting arrangements. The Implementing Rules of the Labor Code of the Philippines prohibit labour-only contracting, which is defined as the supply of workers to an employer whereby a supplier: (i) does not have substantial capital or investment in the form of tools, equipment, machineries, work premises and other materials; and (ii) the workers thus supplied perform activities directly related to the principal business or operations of the user enterprise. The suppliers involved in this kind of labour-only contracting are recognized merely as agents of the user enterprises, which are considered to be responsible to the workers in the same manner and extent as if the workers were directly employed by them (s. 9). The legitimacy of job contracting is recognized under the following conditions: (i) the subcontractor carries on an independent business and undertakes the contract work under his or her own responsibility according to his or her own manner and method, free from the control and direction of the employer or principal in all matters connected with the performance of work, except as to the results thereof; and (ii) the subcontractor has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of the business (s. 8). In July 1994, the Center for Research and Special Studies (CRSS) of the Philippines submitted to the Secretary of Labor a report, which had been commissioned by the Department of Labor and Employment, on a comprehensive review of the Labor Code in force. This report contains a number of important novelties concerning provisions regulating contract labour arrangements. First, it proposes to declare labour-only contracting unlawful. Second, it gives the Department of Labor and Employment the power to license job subcontractors. Third, the draft proposals provide for a list of activities which may be the subject of job contracting: (i) services not directly related to the principal business of the user enterprise or not integral to its main business or operation; (ii) specialized works in certain industries "involving the use of some particular, unusual and peculiar skills and expertise"; (iii) services temporarily needed either for specific tasks such as marketing and computer programming or to meet an abnormal increase in the amount of work which cannot be carried out by the regular employees; and (iv) substitute services for absent regular employees.[7]

The Contract Labour (Regulation and Abolition) Act, 1970, of India (as amended in 1990) gives an example of a relatively broad statutory prohibition that may be interpreted as covering both labour-only and certain kinds of job contracting arrangements. The Act defines a "contractor" as "a person who undertakes to produce

a given result" for the user enterprise "other than a mere supply of goods or articles . . . through contract labour [i.e. through workers hired 'in or in connection with such work by or through a contractor'] or who supplies contract labour for any work" of the user enterprise "and includes a subcontractor" (s. 2 (b) and (c)). It gives the state governments the right to prohibit the employment of contract labour, after having regard to the conditions of work and benefits provided for the contract workers and other relevant factors, including: (i) whether the work these workers perform in the user enterprises "is incidental to, or necessary for the industry, trade, business, manufacture or occupation" carried on in the user enterprise; (ii) whether this work is "of perennial nature, that is . . . of sufficient duration having regard to the nature of industry, trade, business, manufacture or occupation" carried on in the user enterprise; (iii) whether this work is normally carried out by the regular employees of the user enterprise; (iv) whether this work is sufficient to employ considerable numbers of full-time workers (s. 10). A draft Labour Code of India published in 1994 by the National Labour Law Association developed these provisions further. It would prohibit the employment of contract workers, should the above-mentioned factors concur, rather than empower the states to make such prohibitions as envisaged in the Contract Labour (Regulation and Abolition) Act, 1970 (s. 21 (1)).[3]

In Malaysia, legislation provides for the right of the Minister of Human Resources to prohibit by order the employment of any person or class of persons to carry out work other than under a contract of service (s. 2A of the Employment Act 1955). Upon the coming into force of any such order, the arrangement is deemed to be an employment relationship. A similar provision is contained in the Labor Code of the Philippines (s. 106).

Significant changes have recently taken place in the regulation of the activities of labour supply agencies, such as the temporary work agencies (TWAs) mentioned above and other similar labour market institutions, for example staff leasing agencies, which employ workers solely for the purpose of making them available, often on a temporary basis (but sometimes on a permanent basis as well), to work for beneficiary enterprises with whom these workers do not establish a formal contractual relationship. Because of the specific employer status of such agencies and the above-mentioned contradictory interpretations, they have received different legal treatment in different countries. While in some countries the activities of such agencies were regarded as labour-only contracting and thus prohibited, in others these labour market institutions have been legally accepted. However, the tendency towards more flexible regulation of their activities is becoming more and more apparent nowadays and the number of countries where the activities of such labour market institutions are prohibited is diminishing. This reflects the recognition of the important role played by these institutions in contemporary labour markets.

In some countries, where labour supply through TWA-type agencies is allowed, legislation grants these activities the same freedom as other "normal" businesses. In others they are covered by special legislative provisions, and are subject to certain limitations intended: (i) to ensure that only reputable and solvent businesses are engaged in such arrangements; (ii) to provide the workers concerned with appropriate protection; (iii) to protect the employment of regular employees of user enterprises.[4]

As regards the scope of such activity, some countries have imposed certain restrictions through legislation that identifies circumstances under which an employer

can recruit temporary workers through such agencies. For instance, the Belgian Act of 24 July 1987 on temporary work and on supplying workers to user enterprises prohibits, in principle, supplying workers to user enterprises unless this is for the execution of temporary work — such as replacement of a worker whose contract of employment was suspended (with certain exceptions) or expired, or an extraordinary increase of work or the performance of an exceptional job — and unless a temporary work agency is used (ss. 1, 7, 21, 31). The Worker Dispatching Law of 1985 of Japan lays down two criteria for allowing worker dispatching: (i) activities which require special knowledge, technical skill or experience, or (ii) activities requiring special management of the workers (s. 4). At present, a Cabinet Order designates 16 categories of work which may be performed by dispatched workers, including computer programming; machinery design and drafting; machinery operation for sound and image production for broadcasting; production of broadcast programmes; operation of office machinery; interpretation, translation and shorthand; secretarial work; filing; market research; management of financial affairs; drafting of foreign exchange documents; presentation and explanation of manufactured goods; tour guiding; cleaning of buildings; operation and maintenance of building equipment; and building reception, guiding, and management of parking lots.

Being formally employees of the TWA-type agencies, the workers concerned already enjoy the protection provided by general labour and social security legislation. In addition, specific provisions have also been laid down in the legislation of a number of countries regarding the responsibilities of the user enterprises. The Act of 1994 on temporary work agencies of Spain, for instance, contains a number of provisions defining the relationship between the worker supplied and the user enterprise (Chapter IV). For example, the user enterprise is obliged to inform the worker, prior to his or her commencing work, of the hazards related to the job and the protective and safety measures to be taken against them (s. 16). Workers are entitled to use the transport and collective facilities of the user enterprise and to submit complaints about their working conditions through the workers' representatives in that enterprise (s. 17). As far as the possibility of disciplinary action is concerned, the Act, which empowers the user enterprises to direct and supervise the worker, stipulates that when the user enterprise considers that a worker has not fulfilled a contractual obligation, it shall bring the matter to the attention of the TWA which supplied the worker so that the agency may take the appropriate disciplinary action (s. 15).

A specific pattern of temporary supply of the employees of one enterprise to another, called "secondment", whereby a triangular relationship is established, has recently been provided for in the legislation of Luxembourg. The Act of 19 May 1994 establishing regulations governing temporary work and the secondment of workers (ss. 25-29) stipulates that employers other than temporary employment agencies may be authorized by the Minister of Labour to second their workers on a temporary basis to other employers in the event of: (i) the risk of dismissals or underemployment; (ii) the performance of occasional work; (iii) restructuring within a group of enterprises. In such cases, the employment contracts of the seconded workers are maintained without loss of wages or allowances.

For certain countries, collective bargaining legislation also plays a role in delineating legitimate contract labour arrangements through the application by labour arbitration bodies of statutory provisions concerning the prohibition of unfair labour practices. Because of the possible damaging impact of such arrangements on a trade

union's bargaining position, they are potentially unfair labour practices. However, this device is resorted to very cautiously in practice. In Canada, for instance, labour arbitration bodies have normally sought to avoid having to make the hard choice between, on the one hand, the degree of cost efficiency that contract labour arrangements may offer a particular employer and, on the other hand, the degree of harm it causes to employees and their union. Therefore, while clearly understanding that their role is not to make decisions about what constitutes "fair" levels of cost efficiency and how the labour process should best be organized to achieve them, these bodies try nevertheless not to give the employer free rein. They have worked out two criteria for the identification of unfair labour practices in relation to contract labour arrangements. Firstly, they have held that unfair labour practices exist where employers stand to derive no quantifiable economic advantage from contract labour arrangements, the absence of such an advantage indicating that the employer's sole purpose must be to undermine the union. Secondly, the unfair labour practice is made out if the employer's *primary* objective is to undermine the union even though it stands to gain some secondary business advantage from contract labour arrangements.[5]

In cases of violation of the above-mentioned regulations, the legislation of a number of countries provides variously for certain consequences, including the following: (i) the contract between the subcontractor and the user enterprise, according to which the employees of the former are provided to the latter, is regarded as null and void, although without affecting the employment contracts of these employees with the subcontractor employing them (for example, Belgium); (ii) the relationship between a worker thus engaged and the user enterprise is regarded as a contract of employment without limit of time which begins with the execution of work; the user enterprise therefore has to assume all responsibilities and obligations provided by labour legislation; such a worker is free to terminate this contract at any time without prior notice and indemnities (for example, Belgium, Germany, Italy); (iii) joint responsibility of both the subcontractor and the user enterprise (for example, Belgium); (iv) penalties in the form of fines or imprisonment imposed on both the user enterprise and the subcontractor (for example, Austria, France, Germany, India, Italy, Japan).

### *Authorization of contract labour*

A number of legislative enactments have concentrated on organizational measures in order to bring contract labour under the control of the public authorities with a view to protecting the interests of the workers involved. The main instrument used for this purpose is authorization, whereby a subcontracting arrangement receives legal recognition if certain conditions are met, such as the establishment of the legal personality of the business involved and the posting of a bond. These conditions are aimed at guaranteeing the fulfilment of the employer's obligations by the contracting parties towards the workers concerned. They can relate to both job and labour-only contracting.

The Indian Contract Labour (Regulation and Abolition) Act, 1970, for example, provides for registration of principal employers and the licensing of subcontractors. Registration of a principal employer is a necessary precondition to the utilization of contract labour, where it is not prohibited. The Act also provides for the possibility of

revocation of registration by the competent authorities in cases where it "has been obtained by misrepresentation or suppression of any material fact" (s. 8). When licensing subcontractors, a competent public authority may stipulate in the license certain conditions such as "hours of work, fixation of wages and other essential amenities". Such a licence "shall be issued on payment of such fees and on the deposit of such sum, if any, as security for the due performance of the conditions as may be prescribed" (s. 12 (2)). However, if a licence has been obtained by misrepresentation or suppression of any material fact or the holder of a licence failed to comply with the conditions subject to which the licence has been granted, the competent public authority can revoke or suspend the licence or forfeit the sum, if any, or any portion thereof deposited as security for the due performance of the conditions subject to which the licence has been granted. Such decisions can be contested by the subcontractor concerned within 30 days (ss. 14 and 15).

According to the Manpower Provision Act of 1972 of Germany, the licence for the temporary supply of labour as a commercial operation shall not be granted to an applicant who "does not comply with statutory provisions relating to social security, to the withholding and remittance of payroll tax, to placement, to recruitment of workers abroad, to work permits or to occupational safety and health, or does not fulfil the obligations imposed on him by labour legislation" (s. 3 (1)). A competent public authority may cancel the licence issued if it has been obtained by fraud, intimidation or an offence against the law (s. 4 (2) 1).

There are also examples of a more flexible approach as regards the relationship between the TWA-type agencies and the public authorities. In a number of countries such agencies have acquired the same status under the ordinary commercial law as other service enterprises, so that they receive their business legitimacy by entering the agency's name in the trade register or/and declaring themselves to the tax authorities. In the United Kingdom, for example, the Deregulation and Contracting Out Act (DCOA) adopted in 1994 repealed the licensing requirements, introduced in 1973, as regards all employment agencies and businesses,[6] while leaving untouched the statutory minimum standards on the conduct of agencies, and the right of labour inspectors to investigate the latter. Such a move has been justified by the argument that licensing no longer plays a significant role in maintaining standards, and the existence of a licence does not guarantee the continuing honesty or reliability of the holder. In place of licensing, the Act introduces new enforcement powers, whereby a competent public authority can apply to an industrial tribunal for a prohibition order, preventing an unsuitable person from operating an employment agency or business.

The British Columbia Employment Standards Act 1980 (Canada) provides for a compulsory licensing scheme for farm labour subcontractors, a salient feature of which is that a user who knowingly engages the services of an unlicensed subcontractor is affixed with responsibility for any wages and benefits owed by the latter to its employees. The licensing criteria are mainly designed to ensure that only financially viable and honest subcontractors are allowed to operate and that they act professionally and responsibly towards their employees (ss. 60-70).

The Worker Dispatching Law of 1985 of Japan, allows two types of dispatching business, and establishes two corresponding systems of state control over these activities. A regular employment-type worker-dispatching business ("specialized worker-dispatching business"), where a dispatched worker is hired on a permanent basis, is required to notify the Ministry of Labour (s. 16). The second type of worker

dispatching ("general worker-dispatching business"), where the agency has workers register with it in advance and concludes an employment contract with the worker at the request of a client company, requires licensing by the Minister of Labour (rather than merely having to give notice), since this type of worker dispatching is more unstable (s. 5).

### *Labour inspection*

The role of the labour inspectorate or similar bodies, which bear major responsibilities in promoting the observance of labour and social security laws, is of vital importance for the eradication of abusive practices and the protection of contract workers. It is strengthened by measures provided for by legislation requiring that the public authorities be kept informed as regards the terms of the contract entered into by the subcontractor and the user enterprise. In Congo, for example, the subcontractor has to report to the labour inspector the nature and probable duration of the work and the place where it is to be carried out. In Mauritania the user enterprise has to deposit a copy of the contract with the labour inspectorate and the subcontractor is required to forward to the same authority a copy of the notice posted giving the name and address of the worksites to be used and the number of workers intended to be employed.

In Italy, the Minister of Labour, acting through the labour inspectorate, is responsible for the application of the above-mentioned Act of 23 October 1960 (s. 7).

The legislation of some countries requires that the user enterprises or the subcontractors, or both, inform the competent inspectorate, before the contract is executed, of their names, addresses and business statuses or titles, and the location of each workplace (s. 77 of the Labour Code of Senegal, for example) or forward to the labour inspectorate a copy of the contract (s. 36 of the Labour Code of Mauritania and s. 61 of the Labour Code of Gabon, for instance).

### *Requirement to inform, consult or negotiate with workers' representatives*

The legislation of a number of countries specifically provides that it is the right of the representatives of regular employees of the user enterprises to be informed of or consulted on the possible use of an external workforce by the employer. For example, such a provision is laid down in the Act respecting cooperation within undertakings of 1978 of Finland (s. 9). Swedish legislation has gone further and empowered the unions with the right to veto, inter alia, the employers' decisions concerning recourse to an external workforce. According to ss. 38 and 39 of the Act of 1976 respecting co-determination at work, before deciding to have anybody perform work without entering into an employment relationship, an employer has to initiate negotiations with a workers' organization to which such an employer is bound by a collective agreement. Should the relevant unions substantiate that the proposed arrangements imply a disregard for the law or for the collective agreement in force, the proposed arrangements may not be implemented. In the event of wrongful exercise of this right to veto, the union can be held liable for any prejudice caused to the employer (s. 57).[7]

### *Guarantee of equal treatment with regular employees of user enterprises*

One of the means of regulating contract labour is application of the principle of equal treatment between contract workers and regular employees of user enterprises.

The legislation of a number of European countries (Austria, Belgium, Denmark, France and Portugal, for instance) has entitled the workers supplied by the TWA-type agencies to equal treatment with regular employees of the user enterprises as regards pay and other conditions of employment. Exceptions have been made with regard to a number of issues in respect of which the nature of temporary work may require different rules, such as probationary period, notice periods, termination procedures and representation rights.[8]

The Labour Code of Saudi Arabia makes such equality of treatment conditional on the nature of the work carried out by the subcontractor, in terms of whether it is "core" or "peripheral". It provides that "if the employer entrusts to a natural or juridical person one of his principal operations or any part thereof, the latter shall give his or its employees all the rights and privileges granted by the employer to his own employees" (s. 8).

The Federal Labour Act of 1969 of Mexico draws a distinction between the established subcontractors possessing sufficient resources to meet their obligations towards the workers they employ and those who have no such resources ("intermediaries"), and provides that the workers recruited through the latter are entitled to enjoy conditions of work corresponding to those enjoyed by the workers of the user enterprises performing similar tasks (s. 15-II).

The right of contract workers to equal treatment also implies their protection from discrimination. While in a majority of countries, the question whether or not such workers can enjoy protection provided by the respective legal enactments depends on their recognition as employees, in some other countries special measures have been provided for to protect contract workers from discrimination. In the United Kingdom, for example, the Sex Discrimination Act 1975 contains a special provision relating to contract workers (understood as individuals employed not by the user enterprises but by other persons, who supply them under a contract made with the user enterprises). It provides that where there is work available for contract workers, the user enterprises may not (with certain exceptions) discriminate against a woman: (i) in the terms on which she is allowed to do that work; (ii) by not allowing her to do it or continue to do it; (iii) in the way she is afforded access to any benefits, facilities or services or by refusing or deliberately omitting to afford her access to them; (iv) by subjecting her to any other detriment (s. 9). In a recent case, United Kingdom case-law has made a reference to that provision when protecting the employment rights of a woman whose reinstatement in the employment she had as a contract worker before her maternity leave was refused by the employer.[9]

The above-mentioned Act of 23 October 1960 of Italy provides that contract workers who carry out work or services, including porterage, cleaning or ordinary maintenance of premises, inside the user enterprises should be guaranteed (jointly by the user enterprise and the subcontractor) statutory conditions of work "at least equal to the wages and conditions of work" enjoyed by the regular workforce of the user enterprise. The same rule is also applicable in the case of contracting out of work or

services by enterprises providing certain public services, including collecting dues, installation of meters, maintenance of the distribution system and connections (s. 3). The application of this principle of equality of treatment between the regular workforce of the user enterprise and contract workers as regards both legal treatment and the provisions of collective agreements has been confined to contract labour arrangements related to a "core business" or a "normal productive cycle" of the user enterprise.

An important and rather widely used method of providing contract workers with equal protection under labour and social security laws is their assimilation to the regular employees of the user enterprises. This can be done through a wider interpretation of the term "employee", as has already been explained above in Chapter II.

Such assimilation, either through legislation or in collective agreements, may be of a general nature, extending the whole range of protective provisions existing in legislation and in collective agreements to contract workers, or it may only concern certain aspects of an employment relationship or of the collective bargaining and representation rights of such workers.

### *Requirement that contracts between subcontractors and user enterprises state the conditions of work of the workers engaged*

The legislation of a number of countries requires that contracts between user enterprises and subcontractors providing workers to the user be drawn up in such a way as to stipulate clearly the conditions under which the work agreed upon should be carried out. The Labour Code of Mauritania, for example, requires that every contract between the user enterprise and the *tâcheron* (a specific pattern of intermediary subcontracting found in a number of French-speaking African countries, mentioned in Chapter I) be concluded in writing and specify: (i) the purpose and duration of the contract and the place where it is to be performed; (ii) the approximate number of workers to be recruited and their skills, hours of work and wage rates; (iii) the names and addresses of the user enterprise and the *tâcheron* and full details of their civil status (s. 34c). Belgian legislation has made some further inroads into this problem and provides that special tripartite (triangular) contracts between the user enterprises, subcontractors and the workers concerned shall be concluded for the purpose of defining the conditions and the period of work.[10]

In other countries, similar requirements are laid down by legislation with regard to the contractual relationship between TWA-type agencies and user enterprises. According to the Worker Dispatching Law of 1985 of Japan, for instance, the contract between the agency and the user enterprise must prescribe: (i) the content of work to be performed by dispatched workers; (ii) the location of the workplace; (iii) matters pertaining to the person who directly supervises the dispatched workers; (iv) the period of worker dispatching and the days on which the work is to be performed; (v) hours of work and matters related to health and safety; (vi) the number of dispatched workers whom these matters concern (s. 26).

In Italy, special rules have been established for contracting out arrangements in the postal services, railways and state monopolies. These public agencies are obliged to insert clauses in the subcontracting agreements which guarantee contract workers

the wages and working conditions provided by the collective agreement pertaining to the sector in which the subcontractor operates. If more than one collective agreement exists in the sector, the conditions most favourable to the workers concerned should apply.[11]

Other legislation also provides for the obligation of the subcontractor to inform the workers engaged of the subcontractor's status, name and address, the name and address of the user enterprise, and dates of payment of wages by posting notices in the workshops and business premises used. A copy of such a notice should be sent to the user enterprise (ss. 77 and 78 of the Labour Code of Senegal and ss. 56-57 of the Labour Code of Cameroon, for example).

### *Assignment of legal responsibility for the employer's obligations regarding wages, working conditions, safety and health and social security to user enterprises, subcontractors or both*

The very fact that in the course of subcontracting arrangements the workers concerned become dependent on both contracting parties implies a coordination of functions between the latter with regard to protection of the conditions of employment of these workers. The degree of such coordination depends mainly on the extent to which the user enterprises control the performance of the work contracted. The more they direct and supervise contracted workers, the more coordination between the user enterprises and the subcontractors is required in order to protect these workers properly.

Labour law doctrine has developed certain formulas and techniques through which this kind of coordination can be achieved. While these formulas and techniques are varied, they are aimed at the same target, which is to exclude the possibility of leaving the workers concerned (i.e. dependent workers) without a clearly identified contractual counterpart responsible for the conditions of employment of such workers. Sometimes, even where the responsibility is clearly placed on an enterprise, the risk that the enterprise would not be able to assume it has led to pressure to ensure protection of the workers involved.

#### *Joint and several responsibility regarding wages and working conditions*

In many countries the methods of determining the wages and other working conditions of contract workers do not deviate significantly from that established for "standard" employment. It is left either to the parties themselves or to collective agreements, either negotiated by unionized contract workers with the enterprises concerned (still very rare), or concluded in a particular economic sector and hence applicable to the employers involved in contract labour arrangements.

In situations where the employment status of contract workers is recognized as that of "standard" employees, remuneration of such workers is protected by the same labour law provisions that are applicable to "standard" employment. Where such workers have not been granted "employee" status, or have not received equal treatment with regard to "standard" employees, or have not been assimilated to them, the statutory protection of wages provided for in labour legislation becomes difficult to apply.

Moreover, because of the still low level of unionization of contract workers and frequent difficulties in the identification of their counterpart in wage bargaining, i.e.

their employers, collective bargaining machinery does not play the same wage fixing role as it does in a "standard" employment situation. The wages of contract workers are frequently established independently from collective agreements applicable to "standard" employees, and may thus be considerably lower than those of the latter. Therefore, other wage fixing instruments, such as legislation or decisions of public authorities, can play an important supplementary role in providing contract workers with appropriate protection as far as their wages are concerned. Such instruments have already been set in motion in some countries in relation to particular categories of workers who might be employed through contract labour arrangements, such as homeworkers, for example.[12]

The scattered information available on the subject shows that legislation, where it exists, is confined mainly to guaranteeing payment of wages to contract workers through the identification of the respective roles and responsibilities of the user enterprises and subcontractors vis-à-vis the workers concerned.

Joint and several liability is the most frequent pattern of coordination of employer responsibilities between the parties to subcontracting arrangements regarding wages and other conditions of work of the workers involved. It implies liability "imposed on each of several parties jointly, and also severally, so that a party may claim against all, or against any one, leaving it to that one to seek any relief from the others".[13] It might also concern either the whole range of conditions of employment of the workers thus engaged or some (or even one) of them. For instance, the above-mentioned Employment Act of Malaysia provides for the user enterprises' and subcontractors' joint and several liability with regard to wages due to the workers concerned.

In August 1994 the California State Senate (in the United States) passed a bill (AB 3046) on "joint liability legislation" as a response to the violations of laws on wages, working time and child labour that had been revealed by the findings of a survey of the activities of 69 subcontracting clothing workshops. While under the previously adopted legislation, the user enterprises were already liable for some labour law violations by their subcontractors if the latter were not licensed by the State or failed to comply with other provisions, under the new legislation the user enterprises have to police even the subcontractors that are duly registered or else pay for their labour law violations.[14]

Sometimes joint and several responsibility is confined to subcontracting arrangements relating to "normal" ("core", "principal") activities of the user enterprises. The Labour Code of Saudi Arabia, for example, provides that if the user enterprise entrusts to a natural person or legal entity one of its principal operations or any part thereof, the latter shall give the workers thus engaged all the rights and privileges granted by the user enterprise to its own employees and both shall be jointly and severally responsible for such rights and privileges (s. 8).

The Contract Labour (Regulation and Abolition) Act, 1970, of India, for instance, places the responsibility for payment of wages to contract workers on the subcontractors. However, the user enterprises also have a certain role to play. According to the Act, every user enterprise has to nominate a representative to be present at the time of disbursement of wages by the subcontractor and it is the duty of that representative to certify the amounts paid as wages in such manner as may be prescribed. It is the duty of the subcontractor to ensure the disbursement of wages in the presence of the authorized representative of the principal employer. In case the subcontractor fails to make payment of wages within the prescribed period or makes

short payment, the user enterprise is liable to make payment of wages in full or the unpaid balance due to the workers employed by the subcontractor and can recover the amount so paid from the subcontractor either by deduction from any amount payable to the latter or as a debt payable by the subcontractor (s. 21).

The decision as to whether a particular subcontracting arrangement relates to the "normal" ("core", "principal") activities of the user enterprise often falls within the competence of the judicial bodies. The following are examples from Argentinian jurisprudence of activities regarded as "normal" and thus paving the way for the recognition of joint and several liability of the contracting parties: (i) kitchen services in hospitals; (ii) security services performed for various industrial and service undertakings, such as a drinking water supply undertaking; (iii) maintenance services in industrial undertakings. There are also examples of work carried out by the subcontractors which was not regarded as "normal" activities of the user enterprises: (i) loading of goods to be exported by an exporting enterprise; (ii) cleaning services provided by the subcontractor for whom such services are its main activities. Judicial practice is still inconsistent and in some cases similar activities have been considered as belonging to different categories (some security and catering services, for example, were found to be "peripheral").[15]

Some legislation grants user enterprises the right to require the subcontractor to furnish a bond equal to the cost of labour under contract on condition that the bond will answer for the wages due to employees should the subcontractor fail to pay the same (s. 7 of the Implementing Rules of the Labor Code of the Philippines).

In the countries where legislation has drawn a distinction between intermediaries acting on behalf of the user enterprises and independent subcontractors acting on their own account and at their own risk (Venezuela, for example), the workers engaged through such intermediaries are considered to be employees of both the user enterprises and the intermediaries. As a result, both contracting parties are held jointly liable for all the obligations stipulated in labour and social security legislation. Independent contractors, on the other hand, are considered to be persons who perform the work on behalf of others, assume all the risks involved, carry out the work with their own resources, and enjoy technical and administrative freedom (independence) in its performance; in this capacity they are themselves regarded as employers of the workers engaged (ss. 49, 54-56 of the Organic Labour Act of 1990 of Venezuela).

*Responsibility regarding health and safety*

As has already been mentioned in Chapter II, protection of workers' health and safety is one of the major problem areas arising out of the growing recourse to contract labour arrangements. Because their employment status is often uncertain, the workers concerned can find themselves outside the protection provided by labour laws to "standard" employees. Therefore, in some countries certain measures have been taken, both through legislation and voluntarily by the contracting parties themselves, to ensure adequate protection for the workers concerned.

As regards legislation, in a number of countries the application of relevant protective provisions of labour legislation has been extended to all workers, irrespective of their employment status ("standard" or "non-standard"). In Canada, for instance, employers are required to take reasonable care to safeguard the health and safety of all workers at the worksites, including self-employed persons, and in some

provinces subcontractors are obliged to ensure that every worker engaged on the worksite for which the subcontractor either is "primarily responsible" or owns complies with his duties under the legislation.[16]

The above-mentioned Act of 19 May 1994 of Luxembourg, for example, provides that the user enterprises shall be solely responsible for safety, hygiene and health conditions at work of the workers supplied and for the application to such workers "of legislative, regulatory, administrative and collective agreement provisions relating to working conditions and the protection of workers in their occupational activities" (s. 12).

In Australia, the safety and health protection of contract workers is achieved in one of two ways. First, a statutory duty of care is owed to all persons present in a workplace (including the public) regardless of their status. The occupational health and safety legislation imposes general obligations on employers, employees, manufacturers, principal contractors, occupiers and persons in control of workplaces to ensure that safety standards are observed. It also provides that a person on whom a duty is cast is liable for breach of that duty notwithstanding that the wrongful act or omission was contrary to her or his instructions or was the act or omission of another person. Second, the coverage provided by legislation regarding workers' compensation for work-related injuries is statutorily extended to contract workers. A worker is defined in this legislation to include persons who would not be employees under the common law tests. For instance, an independent contractor can be a worker even if he or she employs someone else so long as he or she is doing work alongside other employees. This legislation also covers a situation where a worker is "lent" or supplied by another employer or by a TWA-type agency. Where there are doubts in the interpretation of these provisions, case-law often favours the injured worker.[17]

There is also evidence that appropriate safety measures with regard to contract workers are voluntarily being taken at the enterprise level. An example might be drawn from the pulp and paper industry where, as mentioned above, the incidence of accidents among contract workers has been quite high. One sizeable mill in southwestern France usually had about 150 external workers in the mill, compared to 615 mill wage-earners. The record of accidents involving contract workers was twice as high as with regular employees. This was attributed to a large extent to the unclear status of contract workers. Both their external employers and mill supervisors acted as if they were temporary mill employees. Neither side felt responsible, however, for safety instruction and enforcement. The mill clarified the responsibility of the contracting firm in this respect in a new clause in the contract. The actual problem, however, was the lack of coordination and supervision on the shop floor on the part of the contractors. That situation was overcome by the creation of a subcontractors' association at the initiative of the mill and with the involvement of its safety and health committee. The director of the association (created in 1990) acts as chief executive for all mill-related work carried out by the contractors. In the following two years, accident rates among contract workers went down by 50 per cent, but they were still higher than among regular employees.[18]

*Responsibility regarding social security coverage*

Lack of social security coverage is also a problem which frequently arises in the course of contract labour arrangements. Different reasons contribute to it. One reason is the above-mentioned uncertainty regarding the employment status of the workers

concerned. In many countries entitlement to social security benefits is employment-related, with contributions being made by employers, employees, or both, and is thus dependent on the existence of an employment relationship. Another reason is that some subcontractors fail to fulfil their social insurance obligations as regards their employees, either arbitrarily or through negligence or insolvency, if the responsibility for social security coverage falls on them. Assimilation of certain contract workers to employees of either the user enterprises or the subcontractors (where this occurs) resolves this problem on the legal level at least. Lastly, certain individual and group subcontractors, i.e. the "self-employed" and "gangs", respectively, may be either unable or unwilling to make appropriate contributions of their own and thus find themselves outside social security coverage. Different measures have been taken in the legislation of a number of countries to address this problem.

In some countries full or partial social security coverage has already been provided to certain categories of contract workers, such as "self-employed" persons or homeworkers.[19]

In other countries, labour legislation clearly indicates those who should be responsible for payment of social security contributions to protect the contract workers concerned. For instance, the legislation of a number of countries on the activities of TWA-type agencies defines these agencies as employers of the workers supplied and thus requires them to make such contributions (s. 12 of the Act of 1994 regulating temporary work agencies, of Spain, for example).

The above-mentioned Act of 23 October 1960 of Italy provides for joint responsibility of the user enterprise and the subcontractor for the fulfilment of all the obligations concerning social security legislation (s. 3).

Sometimes social security legislation contains special provisions concerning contract workers. For example, the Social Security Act, 1990 (s. 52), and the Workmen's Compensation Act, 1994 (ss. 10 and 11), of Thailand define the respective responsibilities of user enterprises and subcontractors with regard to social security contributions to be paid in order to provide the workers concerned with the necessary social security coverage.

In some countries the coverage of social security laws has been extended to contract workers by recognizing them as "employees". In Australia, for example, the statutory superannuation scheme commits all employers to providing contributions for all employees. The Superannuation Guarantee (Administration) Act 1992 provides that the term "employee" includes a person who works under a contract that is wholly or principally for the labour of the person (s. 12 (3)).

*Division of responsibility*

Responsibilities can also be divided (apportioned)[20] between the user enterprises and the subcontractors, depending on the degree of control they respectively exert over the workers engaged; in this case each party has its own obligations in relation to a particular labour relations field (wages, health and safety, security of employment, etc.).

In the case of labour contracting through TWA-type agencies, for example, the legislation of a number of countries provides that the workers concerned are considered to be employees of these agencies and that all employers' obligations and responsibilities stipulated in labour and social security legislation remain in force for

them. As regards the user enterprises, they are considered responsible for the application of provisions of labour legislation concerning hours of work and rest, work of women and of young people, night work and health and safety regulations with regard to a workforce provided by the temporary work agencies. Section 28 of the Act of 19 May 1994 of Luxembourg, for example, stipulates that the user enterprises are solely responsible for safety, hygiene and health conditions at work and for the application to seconded workers of all relevant regulations and provisions of collective agreements, while the supplying agencies are held responsible for the remuneration of such workers and the relevant social security coverage.

*Responsibility in the event of insolvency of the subcontractor*

In a number of countries, labour legislation provides for responsibility of the user enterprise for the subcontractor's obligations towards the workers concerned, in the event of the subcontractor's becoming insolvent.

The Labour Code of Brazil, for example, stipulates that the subcontractor is to be held primarily responsible for the obligations arising out of the contract of employment, whereas the employees have the right to bring an action against the user enterprise if the former fails to fulfil the said obligations. At the same time, the user enterprises are entitled to bring an action under the provisions of civil law against the subcontractor for the recovery of sums paid and have the right to withhold sums due to the subcontractors as a guarantee for the fulfilment by the latter of obligations towards the workers engaged (s. 455).

Other legislation differentiates this kind of liability depending on the place where the contracted work is carried out. In France, for instance, the liability of the user enterprises differs depending on where the contract workers carry out the work agreed upon between the former and the subcontractor. The Labour Code provides that: (i) where the work is performed or the services provided on the premises of the user enterprise or its subsidiary premises, the user enterprise shall be held responsible for the payment of wages, leave with pay, the obligations resulting from the legislation governing social insurance, employment injuries, occupational diseases and family benefits, should the subcontractor become insolvent; (ii) where the work is being carried out on premises other than those belonging to the user enterprise or is performed by the employees working at home, the user enterprise shall be responsible for the payment of wages and leave with pay, as well as the payment of family benefit contributions and the double contribution towards social insurance, should the subcontractor become insolvent (s. L. 125-2).

The Labour Code of Senegal, as amended in 1987, provides that where the work is carried out on the premises of the user enterprise, the user enterprise shall be substituted for the subcontractor as regards the subcontractor's obligations towards the workers if the latter becomes insolvent. However, when the work is carried out outside the user enterprise's premises, the user enterprise is liable only for payment of wages, holiday allowances and social security obligations, should the subcontractor become insolvent (s. 76).

## European Union law

### *Normative arrangements*

The European Union (EU) has established no comprehensive legal instrument to regulate contract labour arrangements. However, it has endeavoured to adopt directives to protect the workers engaged in various non-standard ("atypical" or precarious) employment patterns, including temporary work, which might have certain marginal effects on contract labour arrangements.

Work towards the elaboration of legislation on temporary employment and TWAs ended in 1984 when the Community failed to adopt the draft directives on these questions. Since then the Union has made four other attempts to elaborate standards on the subject. Thus, under the Social Charter Action Programme three draft directives were issued in 1990 with a view to addressing various aspects of atypical employment.

The first, guaranteeing temporary workers, including those employed by TWAs, health and safety protection equivalent to that provided to permanent employees of the user enterprises, was adopted by the Council in June 1991 as Directive 91/383/EEC and entered into force in December 1992.

The second proposal gives part-time and temporary staff employed for at least eight hours a week equal access to company vocational training and social services, equal treatment with regard to benefits granted under social assistance and non-contributory social security schemes and priority consideration for full-time vacancies.

Under the third proposal, which is presented as a single market measure to prevent distortions of competition between States due to national differences in social protection costs, minimum standards should be applied to the employment of atypical workers working at least eight hours per week.

In view of the deadlock on these last two proposals, the Belgian EU Presidency produced in 1993 a single integrated text on non-standard employment contracts incorporating many elements of the originally drafted texts. That, however, failed to acquire significantly more support than its predecessors. In July 1994 the German Presidency revised the proposal, presenting it as a measure to enhance job creation. The new text aims to establish equal treatment in employment conditions between part-time and full-time employees, and temporary and permanent staff, except where different treatment is objectively justified. No weekly hours criteria are laid down as far as the applicability of this draft directive is concerned. Social security issues were removed from this text. TWAs and subcontracting arrangements were also excluded from its scope. In the Social Affairs Council in December 1994, this draft directive failed to receive the unanimous support required, as a result of the United Kingdom's rejection. The issue is now to be pursued via the Agreement on Social Policy (known as the "Social Charter") which from 1995 encompasses 14 EU States, excluding the United Kingdom but including Austria, Finland and Sweden.[21]

The fourth draft directive put forward in 1991 concerns the temporary posting of workers within the EU. It is aimed at standardizing conflict of law rules used to determine which national labour law regime applies to workers posted temporarily to another EU State. The proposal covers all enterprises which exercise their activities in the framework of the provision of services, irrespective of where they are established. Its obligations apply in three specific circumstances: (i) where the subcontractor

performing a contract for services posts a worker on a temporary basis to another Member State; (ii) where a TWA-type agency places a worker to carry out work on a temporary basis with a user enterprise in another Member State; (iii) where an enterprise places a worker on a temporary basis with one of its establishments, or another enterprise, in another Member State.[22] In 1994, the Social Affairs Council failed to approve a "common position" on a revised text, with opposition coming mainly from Greece, Portugal and the United Kingdom. France passed its own legislative enactment on the subject in 1993.[23] Belgium, Denmark and the Netherlands already have broadly similar arrangements in place. Therefore, a growing number of northern European countries — those with the highest labour costs — are taking measures aimed at ensuring that incoming companies cannot distort competition because of national differences in labour costs. At the Social Affairs Council meeting held in March 1995, the French Presidency submitted a new text of the proposal. It was substantially more rigorous than its predecessors, in that it sought to apply host-country pay and conditions from day one of the posting, rather than stipulating a waiting period of some months. However, this has proven to be an obstacle to agreement among the members of the Council. As a result, further deliberations on the subject have been recognized as necessary.[24]

The latter draft directive interfaces to some extent with the Directive on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC), in force in the EU since June 1993. It stipulates that employers must provide employees with written details of the main terms and conditions of employment within two months of starting a job. Additional information must be given to employees sent to work for at least a month outside the Member State whose law governs the employment contract. This includes details (including references to appropriate laws or agreements) of the length of employment abroad, conditions governing the employee's repatriation, the currency used for salary payment, and any benefits in cash or in kind attendant upon the employment abroad.

The effects of the growing recourse to various atypical patterns of employment, including contract labour, on European Union law are not, however, confined to the problem of legislating new standards on the subject. It has exacerbated the problem of implementation of existing standards as well. An example of this is the differences of interpretation which emerged on the revision of the 1977 Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (77/187/EEC). The original Directive was aimed at protecting the contractual terms of workers employed in businesses which are transferred to new ownership. According to it, where such a transfer occurs, all of the transferor's rights and obligations arising from a contract of employment or employment relationship existing on the date of the transfer are transferred to the transferee. The revision of the Directive initiated by the EU Commission seeks to clarify what is to be regarded as a transfer. A new clause has been proposed to this end. It indicates that whilst the transfer of an economic entity which retains its identity will be deemed a transfer, the transfer of only an activity of the enterprise will not. However, the proposed distinction between "economic entity" and "activity" has proven to be rather ambiguous and has generated contradictory interpretations, especially as to whether or not the scope of the Directive covers contracting out arrangements.[25] For instance,

the Union of Industrial and Employers' Confederations of Europe (UNICE), in its position paper addressed to the Social Affairs Commission of the European Parliament in December 1994, expressed its concern with the possible application of the Directive to contracting out arrangements, should the proposed amendment be adopted.[26]

### *Judicial case-law of the European Union*

The growing recourse to contract labour arrangements, difficulties with the interpretation of existing directives and remaining legislative loopholes on the subject have meant that the EU judicial body, the European Court of Justice (ECJ), has had to address issues related to contract labour increasingly frequently.

For instance, one of the recent rulings of the ECJ clarified the scope of the above-mentioned Directive (77/187/EEC) concerning the safeguarding of employees' rights in the event of a transfer of an enterprise. It confirmed that, in principle, its provisions apply when services are contracted out to another enterprise, even if the services were provided by a single employee prior to the transfer, if the business concerned retains its identity. The case, referred to the ECJ by a German court, concerned a savings bank whose cleaning activities — carried out by a single cleaner — were contracted out, resulting in the dismissal of the employee. The contracting firm offered to employ the cleaner, who refused on the basis that she would effectively be paid at a lower hourly rate than before. The ECJ, called upon to decide whether the Directive applied in these circumstances, ruled that where the same activity was taking place after the transfer, i.e. where the business in question retains its identity, the Directive is to be applied, regardless of the fact that only one employee is involved (Case No. C-392/92 Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Cronshagen).[27]

This ruling has fuelled developments in the national case-law of EU Member States on the subject. In the United Kingdom, for instance, the implementation of the Transfer of Undertakings (Protection of Employment) Regulations 1981, issued for the purpose of giving domestic effect to EU Directive No. 77/187/EEC, has met with the difficulty of defining the scope of its application with regard to whether or not the Regulations should apply to contracting out or contracting in arrangements. The judiciary has developed a special test (the "retention of identity" test) to examine whether or not such an arrangement results in a transfer, and thus has to be covered by the Regulations.[28] It was emphasized that the identification of an "economic entity" should be based on the evaluation of all the facts relating both to the identity of the undertaking and the relevant transaction, assessing their cumulative effect and looking at the substance and not the form of the activity. The crucial question to be addressed in such cases is whether, taking a realistic view of the activities in which the employees are employed, there exists an "economic entity" which, despite changes, remains identifiable, though not necessarily identical, after the alleged transfer. If, despite changes resulting from the alleged transfer, jobs are still there to be done, albeit for a different employer, the United Kingdom courts apply the Regulations to such cases.

## NON-STATUTORY ARRANGEMENTS

### *Interaction between the social partners*

In countries with well-established systems of national and industry- or nation-wide bipartite/tripartite consultation and negotiation arrangements, contract labour has also become a subject addressed by the social partners and governments. For instance, in Sweden, as early as 1964 a tripartite agreement was concluded between the National Labour Market Board — the body responsible for implementing government employment policy — and the national organizations of employers and workers in the shipbuilding industry. That agreement recommended the observance of certain rules covering the activities of outside enterprises in the shipyards, for example, that subcontractors should have workshops of their own and their own foremen. In the implementation of that agreement, trade unions in the industry concluded agreements with certain intermediaries in order to secure for the latter's workers the same conditions of work as those enjoyed by the regular employees of the shipyards.[29]

In Belgium, the National Labour Council, the national bipartite consultation and inter-occupational bargaining body, has recognized in Opinion No. 450 that in the case of job contracting the workforce of a subcontractor who undertakes to carry out a certain job for a user enterprise remains the subcontractor's employees. The Council has also emphasized that job contracting does not require any particular regulation in so far as labour law is concerned.[30]

Also in Belgium, according to the above-mentioned Act of 24 July 1987, a Joint Committee on the supply of workers through temporary work agencies (*Commission paritaire pour le travail intérimaire*) was set up. Its employer side consists of representatives of the organizations of temporary work agencies and of representatives of the organizations of user enterprises (s. 27). The Joint Committee was established with a view to creating a Guaranteed Income Fund (*Fonds de sécurité d'existence*) aimed at supporting the workers concerned when the agencies supplying them fail to pay remuneration or allowances due these workers in accordance with legislation, contracts of employment or collective agreements (s. 29).

In the Philippines, the Tripartite Industrial Peace Council, established in 1990, chaired by the Labor Secretary and composed of 12 representatives each from the tripartite constituents, has recently discussed the issue of contract labour with a view to coming up with clear and more defined implementing rules under the relevant provisions of the Labor Code.

### *Collective bargaining*

Collective bargaining offers a flexible means of regulating certain aspects of contract labour which are of concern to organized labour. However, the applicability of this instrument is largely confined to industries with a high level of unionization. The lower the level is, the lesser the effect collective bargaining can have on actual contract labour practices. The effectiveness of regulation of contract labour through collective bargaining is still uneven. Collective agreements seem to have been useful to increase control of contracting abuses in some areas and (mainly) in large firms with a strong trade union presence. Collective bargaining occurs much less frequently in

small enterprises, which are often the main players in contract labour arrangements. None the less, it should be emphasized that regulation of contract labour through collective bargaining is an important instrument which may usefully complement, but cannot always replace, legislative control.

In some countries collective bargaining has already sought to regulate contract labour arrangements. In Canada, for instance, 67.4 per cent of collective agreements covering 500 or more employees contained provisions regulating contract labour arrangements in 1989 (an increase from 56.3 per cent in 1980).[31]

The continuing paucity of collectively bargained restrictions on contract labour arrangements reported from many other countries is largely attributed to employers' reluctance to relinquish this important cost-saving practice, especially in difficult economic times. Another reason relates to "peace obligation" provisions provided for in the collective bargaining legislation of a number of countries, according to which strikes are prohibited during the currency of the collective agreement and for the duration of the designated settlement procedures, such as conciliation, which must follow the termination of the collective agreement. Therefore, management may initiate contract labour arrangements during the lifetime of the agreement without fear of industrial action, whereas the union has to wait until the next round of bargaining, possibly a few years ahead, by which time the matter will have become a *fait accompli*. Some observers have proposed to include in collective bargaining legislation provisions enabling the union to re-open collective agreements, and to strike if necessary, to induce employers to negotiate their intention to enter into contract labour arrangements. In this regard, references are frequently made to the legislation of some countries where unions are allowed to re-open collective agreements and bargain about defined technological changes.

As a means of regulating contract labour, collective bargaining practices have developed in two main directions. There are examples of trade unions managing to negotiate clauses in collective agreements that, on the one hand, empower them to exercise a certain control over employers' contract labour arrangements, and, on the other hand, provide contract workers with the same conditions of employment and statutory and contractual benefits as those enjoyed by workers who are employed directly.

Collective agreements on the question provide for indirect or direct trade union influence over contract labour arrangements. In the case of indirect influence, which is most frequently resorted to, an employer undertakes to provide a trade union with information concerning such arrangements. In Italy, for instance, in the mid-1970s most national industry-wide agreements started introducing clauses on the duty of employers to inform trade unions at the territorial and enterprise levels about certain aspects of their policies and practices, including contract labour arrangements. Sometimes such clauses become rather specific and provide for a joint examination of the matter (for example in the textile, footwear and construction industries).[32]

As regards the trade unions' "direct" influence over the employers' contract labour activities, mention should be made, in the first instance, of the provisions of some collective agreements that subject contracting in of an outside workforce or contracting out of part of the business to a requirement that the employer give advance notice and/or consult with the union. An example of such practices is the collective agreement recently signed (settled in March 1995 after a work stoppage) between the MacMillan Bloedel Ltd. mill (Alberni Specialties Division), Port Alberni and the

Communications, Energy and Paperworkers Union of Canada, Locals 592 and 686 (CLC), which provides for the establishment of a joint committee to review all requests for contracting out work made by the employer. The committee is to meet quarterly to make recommendations regarding the utilization of the mill maintenance workforce to minimize the use of subcontractors, both inside and outside the mill. The agreement stipulates that the employer may contract out work to an enterprise which is an open shop or to other subcontractors employing workers who are not members of a "legitimate" trade union, provided that, inter alia: (i) the rate of pay of contracted workers will not be less than that of the regular employees of the mill; (ii) the contractors abide by union and company safety standards; (iii) the employer pays an amount equal to 1 per cent of the total straight-time wages paid to all employees of the contractor on site to the local union, in lieu of dues; (iv) the employer also pays pension contributions equal to the normal employer contribution for all hours worked by employees of any contractor performing work in the mill.[33]

The "closed shop" provisions contained in the legislation or collective agreements in some countries can also play a restrictive role with regard to the employment of contract labour. The Federal Labour Act of 1969 of Mexico, for example, provides that a collective agreement may stipulate that the employer shall admit to his employment only persons who are members of the trade union which is a party to the agreement (s. 395). As a result, practices have begun to develop in this country whereby the labour contracting agencies supply the entire workforce on the basis of arrangements with trade unions, the objective being to ensure that no collective disputes can occur in the client enterprise, inasmuch as the collective agreement is concluded with the labour-supplying agency.

However, the strongest pattern of trade unions' direct intervention in contract labour practices through collective bargaining is when collective agreements provide for certain limitations on such practices. These limitations range from various prohibitions — including outright prohibition of contract labour arrangements during the lifetime of an agreement or prohibition of the contracting in of an outside workforce if it results in the regular employees of the user enterprise being laid off — to certain restrictions on the utilization of contract labour, either confining contracting out to the areas outside the essential ("core") operations of an undertaking or imposing quantitative limits.

In the Federal Clothing Trades Award 1982 in Australia, for instance, it was stipulated that the employer must obtain the consent of the union to employ more than ten outworkers. Such restrictions are frequently spelled out in collective agreements either by identifying the essential ("core") operations of an enterprise that should not be contracted out, or by specifying those supplementary (occasional or "peripheral", or both) jobs or services that can be contracted out. This kind of provision can also be found in some collective agreements signed in Italy since the 1950s in the chemical, metalworking, printing and paper, telephone and electricity industries. An agreement concluded between the Mexican Petroleum Corporation and the petroleum workers' union STPRM in 1969 reiterated the provisions of the Labour Code to the effect that all work pertaining to the essential operations of the industry must be performed by permanent workers, and that contract workers may be used only for short-term work, or, on a temporary basis, to replace permanent workers who are ill or absent. In Venezuela, under an agreement between the Creole Company and the trade union representing its workers, that petroleum company undertook, inter alia, to be in all

cases a "joint guarantor and principal payer" in respect of any legal or contractual obligations towards the subcontractors' employees throughout the duration of the contract work. This agreement also provides that workers employed by subcontractors shall be entitled to the same conditions as workers directly employed by the undertaking in the area in which the work is carried out. Subcontractors who undertake to work for the company were required to give preference in hiring labour for the job to applicants whose names appear on lists submitted by the local trade union. The agreement also guaranteed to contract workers the right of representation by trade unions, specifying that individual subcontractors must accept a given number of trade union delegates per project according to the numbers of unionized workers. Provisions were made for checking off union dues by the subcontractor, subject to the workers' consent.[34]

In the United States, the National Labor Relations Board and the courts have developed a rule according to which an employer, i.e. a user enterprise, must bargain over the decision to subcontract work where regular employees in the bargaining unit are being replaced by employees of a subcontractor and the bargaining unit work will continue to be done under similar conditions of employment. However, when such a decision includes significant capital investment, a change in the nature of the user enterprise's operations, or factors in addition to or unrelated to labour costs, there is no obligation to bargain over the decision to contract, although the user enterprise must negotiate with the union over the effects of the decision on its regular employees. This kind of "effects bargaining" includes issues such as transfer rights, severance pay, continuation of employee benefits and priority status for future hiring.[35]

Sometimes collective agreements confine the choice of the subcontractors to whom the employer can contract out work to the members of the employers' association signatory to these agreements. For example, the agreement between the Electrical Contractors' Association of Ontario (Canada) and the International Brotherhood of Electrical Workers (AFL-CIO/CFL), effective from 1 May 1995, stipulates that the contracting of work to another contractor signatory to the agreement should be recognized and that a contractor is prohibited from directly or indirectly contracting or subcontracting any work to any party not signatory to the agreement.[36]

The 1994 metalworking agreement between the Italian employers' organizations Federmeccanica and Assistal and the unions FIOM, FIM and UILM has placed certain limits on the use of temporary workers, including those recruited through temporary employment agencies, by stipulating situations in which temporary contracts are permissible: for example, for temporary accumulations of work, new product launches or to replace other employees on leave. The number of workers on temporary contracts must not exceed 10 per cent of the total full-time workforce, or 8 per cent, depending on the size of the production unit.[37] A similar provision can be found in the 1994 agreement in the Italian tourism industry. It provides that where a full-time contract is temporarily converted into a part-time one, companies may recruit as a substitute a person on a temporary part-time contract.[38]

Other clauses which are quite common in collective bargaining practices are those that permit contract labour arrangements on condition that: (i) contracted-in workers receive no less favourable terms and conditions of employment from the subcontractor than the user enterprise's regular employees under their collective agreement; (ii) jobs of employees hired before a designated date are protected; (iii)

the employer finds, or makes reasonable efforts to find, alternative jobs for those affected.

Sometimes the unions of user enterprises manage to win "subcontractor clauses" which not only extend the terms of their collective agreements to the contract workers but also require the user enterprise to utilize only the services of those subcontractors whose employees are members of any, or a designated trade union (in the construction industry in Canada, for example).[39]

Some subcontractors pay to trade unions a so-called "displacement" fee (on the assumption that workers who are union members are "displaced" when outside workers are taken on). These fees are paid into the unions' accounts but do not normally produce direct benefits for their members. Such arrangements have been reported in two Mexican enterprises (the Federal Electricity Commission and the Mexican Petroleum Corporation).[40]

* * *

The analysis made above illustrates the major regulatory instruments used to address the problems arising from contract labour arrangements. While the regulation of labour-only contracting generally seeks to limit this form of contract labour to situations where it is objectively necessary and where it works to the advantage of both labour markets in general and employers' and workers' interests in particular, the regulation of job contracting and self-employment generally seeks to confine it to genuine commercial contracting arrangements and to eliminate the abuses that might result from attempting to disguise what is in fact labour-only contracting as job contracting.

Two different normative sources govern conditions of employment of contract workers: (i) provisions of labour and social security legislation, as well as those of collective agreements, applicable to a "standard" employment relationship; (ii) provisions specifically established for the purpose of regulating conditions of employment of "non-standard" ("atypical") workers, including contract workers. The objective is to provide these workers, where appropriate, with protection similar to that provided to the workers in "standard" employment, or to establish special rules to be applied in those areas where, owing to the specifics of contract labour arrangements, the rules governing "standard" employment prove to be unsuitable. The rules governing "standard" employment relationships are extended to such workers either through implementation of the principle of equal treatment with regular employees of the user enterprises by assimilating contract workers to the regular employees of the user enterprises, or through the application of these rules to the employment relationship between contract workers and subcontractors.

The protection of the workers engaged is ensured mainly through the clear-cut identification of employers' responsibilities of both the user enterprises and the subcontractors with regard to payment of wages, working conditions, safety and health, social security coverage and provision of welfare facilities. Administrative control — registration and/or licensing of the user enterprises and subcontractors, the obligation to inform the competent authorities about contract labour arrangements, posting of notices about conditions of such arrangements in workplaces, etc. — is also widely used as a means of ensuring that the existing regulations relevant to contract labour are respected and that the workers concerned know where to turn for redress in the event of infringement of these regulations.

**Notes**

[1] See for details G. Lyon-Caen and J. Pélissier: *Les grands arrêts de droit du travail*, 2e édition (Éditions Sirey, 1980), pp. 246-250.

[2] C. I. Torres: *Contract labour: Law and practice in the Philippines*, report submitted for the ILO research project on contract labour, 1995, pp. 13-16, 34-38.

[3] See: *The Indian Labour Code, 1994 (Draft)*, National Labour Law Association, Friedrich-Ebert Stiftung (India), 1994, p. 38.

[4] See B. Hepple: "Flexibility and security of employment", in R. Blanpain and C. Engels (eds.): *Comparative labour law and industrial relations in industrialized market economies* (Deventer, Netherlands, Kluwer Law and Taxation Publishers, 1993), pp. 265-266.

[5] G. England: *Contract labour in Canada*, report submitted for the ILO research project on contract labour, 1995, pp. 29-31.

[6] See for details: "Deregulation Act affects employment law", in *Industrial Relations Law Bulletin*, No. 511, Dec. 1994, p. 15.

[7] These provisions, which had received a very conflicting reaction from the social partners, were abolished in 1993 (see: Bill 1993/94:67, as regards amendments to the Employment Protection Act, 1982, and the Co-determination Act, 1976). However, the same provisions, slightly amended, were reintroduced in 1994 (see: Bill 1994/95:76, as regards the restoration of the labour law).

[8] See for details "Non-standard forms of employment in Europe. Part-time work, fixed-term contracts and temporary work contracts", in *European Industrial Relations Review*, Report No. 3, 1990, pp. 45-59.

[9] See for details: "Contract worker protected by SDA" in *Industrial Relations Law Bulletin*, No. 511, Dec. 1994, pp. 11-12.

[10] B. Nyssen: *Contract labour: Quand les apparences peuvent être trompeuses*, report submitted for the ILO research project on contract labour, Jan. 1995, p. 23.

[11] T. Treu: *Contract labour in Italy*, report submitted for the ILO research project on contract labour, p. 24.

[12] For details see ILO: *Home work*, Report V (1), International Labour Conference, 82nd Session, 1995 (Geneva, 1994), pp. 36-38.

[13] See: *European employment and industrial relations glossary: United Kingdom* (European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities, Sweet & Maxwell, 1991), p. 125.

[14] ILO: *Effects of globalization on employment and working conditions in the textiles, clothing and footwear industries*, forthcoming.

[15] A. Goldin (in collaboration with J. F. Alimenti): *Contract labour in Argentina*, report submitted for the ILO research project on contract labour, Apr. 1995, pp. 52-53.

[16] G. England, op. cit., p. 12.

[17] L. de Plevitz: *Contract labour in Australia*, report submitted for the ILO research project on contract labour, Mar. 1995, pp. 40-41.

[18] ILO: *Social and labour issues in the pulp and paper industry*, Tripartite Meeting on Social and Labour issues in the Pulp and Paper Industry, Geneva, 1992, Sectoral Activities Programme, TMPPI/1992, pp. 57-59.

[19] See for details ILO: *The promotion of self-employment*, Report VII, International Labour Conference, 77th Session, 1990, pp. 78-86; *Home work*, op. cit. pp. 41-43.

[20] This kind of responsibility is sometimes called "apportioning liability" (see for example J. B. Rebitzer: "Job safety and contract workers in the petrochemical industry", in *Industrial Relations: A Journal of Economy & Society*, Vol. 34, No. 1, Jan. 1995, p. 46.

[21] See IDS *European Report*, No. 395, Nov. 1994, pp. 9-10, No. 397, Jan. 1995, p. 3.

[22] For details see: *IDS European Report*, Feb. 1993, No. 374.

[23] See: *IDS Employment Report*, Jan. 1995, No. 397, pp. 18-19.

[24] *European Industrial Relations Review*, No. 255, Apr. 1995, p. 2; No. 256, May 1995, pp. 2-3.

[25] For details see *Industrial Relations Europe*, Vol. XXIII, No. 267, Mar. 1995, p. 1; the EU Economic and Social Committee: "Opinion on the proposal for a Council Directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses", in *Official Journal of the European Communities*, C 133, Vol. 38, 31 May 1995, pp. 13-22.

[26] *Official Journal of the European Communities*, C 274, Vol. 37, 1 Oct. 1994, pp. 10-15.

[27] See for details: "Transfers Directive covers one-person cleaning operation", in *Industrial Relations Review and Report*, No. 570, May 1994, pp. 11-12.

[28] For details see John McMullen: "Contracting out and marketing testing — The uncertainty ends?", in *Industrial Law Journal*, Sep. 1994, Vol. 23, No. 3, pp. 230-240; "Contracting out and contracting in covered by TUPE", in *Industrial Relations Law Bulletin*, No. 515, pp. 8-13 (*IRS Employment Review*, Feb. 1995, No. 578).

[29] See T. Segeman: "Contract labour in Sweden" an offprint from the *Annales Academiae Regiae Scientiarum Upsaliensis* (Stockholm, Almqvist & Wiksell, 1970), pp. 45-50.

[30] For details see B. Nyssen, op. cit., p. 19.

[31] G. England, op. cit., p. 32.

[32] T. Treu, op. cit., p. 26.

[33] See for details: *Collective Bargaining Review* (Bureau of Labour Information, Human Resources Development, Canada), Apr. 1995, pp. 47-48.

[34] ILO: *Social problems of contract, subcontract and casual labour in the petroleum industry*, Report II, Petroleum Committee, Eighth Session, Geneva, 1973 (Geneva, 1972), pp. 18, 29, 31, 34.

[35] See E. Silverstein: *Contract labor in the United States*, report submitted for the ILO research project on contract labour, July 1995, pp. 34-35.

[36] See: *Collective Bargaining Review*, op. cit., pp. 31-33.

[37] *IDS European Report*, Dec. 1994, No. 396, pp. 20-21.

[38] *IDS European Report*, Feb. 1995, No. 398, p. 21.

[39] G. England, op. cit., pp. 33-34.

[40] N. de Buen: *Labour contracting firms*, report submitted for the ILO research project on contract labour, Dec. 1994, p. 24.

## CHAPTER V

# COLLECTIVE LABOUR RELATIONS

The growing recourse to contract labour arrangements implies, inter alia, that an increasing number of workers could find themselves outside the purview of the standard patterns of collective labour relations. The rapid expansion of "non-standard" forms of workforce utilization resulting from the substantially changed economic and social environment is currently challenging the exercise of union, collective bargaining and representation rights of these workers.

This has initiated a certain readjustment of collective labour relations rules and practices so that the workers concerned can enjoy these fundamental collective rights of workers. It is developing in two major directions. On the one hand, attempts are being made to expand the scope of application of the traditional institutional and procedural framework to cover the newly emerging "atypical" patterns of employment. On the other hand, where these traditional instruments prove to be inadequate, new, more flexible forms of organization and representation are appearing. This process affects both legislation and practice.

Indeed, a climate conducive to the exercise of the collective rights of the workers concerned in today's economic and social context needs to be promoted. Therefore, the interests of both employers and workers have to be carefully accommodated.

### TRADE UNION AND COLLECTIVE BARGAINING RIGHTS

Since contract labour frequently involves a triangular relationship in which there are two employer sides, collective labour relations of contract workers should be regarded from two major perspectives, namely these workers' relationship with the subcontractors and with the user enterprises.

The ambiguous nature of the relationships between contract workers and subcontracting and user enterprises raises questions regarding their collective rights. These concern: (i) whether these workers have the right to establish trade unions; (ii) with which enterprise, if any, they are entitled to bargain collectively; (iii) whether they are entitled to be represented through representative bodies (such as works councils) that may be established in the subcontracting and/or user enterprises; (iv) whether they have the right to strike, and against which enterprise. Information on these questions is still relatively scarce. The analysis made below is based mainly, but not exclusively, on the national reports recently prepared for the ILO on the subject.

#### *The right to organize*

Under ILO standards, all workers, whether employees or not, should have the right to form and join organizations of their own choosing. This has been explicitly

recognized in respect of agricultural workers by the Right of Association (Agriculture) Convention, 1921 (No. 11), and the Rural Workers' Organizations Convention, 1975 (No. 141) (Article 2) (the latter in respect of other rural handicraft workers as well), and in respect of informal sector workers by the Committee of Experts on the Application of Conventions and Recommendations in its recent General Survey on freedom of association.[1]

Under the legislation of several countries, the definition of a "worker" to whom the right to form trade unions is granted seems to go beyond those in an employment relationship.

For example, the Trade Union and Labour Relations (Consolidation) Act, 1992, of the United Kingdom, which provides for a comprehensive set of regulations covering collective labour relations, defines a "trade union" as an organization consisting "wholly or mainly of workers . . . whose principal purposes include the regulation of relations" between them and employers (s. 1 (a)). The term "worker" is defined as an individual who works under a contract of employment or under any other contract and undertakes "to do or perform personally any work or services for another party to the contract who is not a professional client" of this individual (s. 296). Therefore, such a definition seems to imply a possibility of extending the scope of application of this Act to contract workers. This Act also provides for a special guarantee of its application to contracting out arrangements. In section 288 ("Restriction on contracting-out") it stipulates that "any provision in an agreement (whether a contract of employment or not) is void in so far as it purports . . . to exclude or limit the operation of any provision of this Act . . .".

According to the Trade Union Law of 1949 of Japan, the right to organize a union is granted to those who are recognized as "workers", defined as "those who live by their wages, salaries or other remuneration assimilable thereto regardless of the kind of occupation" (s. 3). In order to clarify the meaning of this provision, a number of factors have been employed in administrative and judicial decisions. These include: (i) that these persons perform indispensable work for the enterprise and that they are an essential component of the latter; (ii) that the content of their contracts is unilaterally decided; (iii) that these persons are supervised with regard to such matters as date, time and hours, the place, and the method of performing their work; (iv) that they are not free to accept or refuse contracts relating to their employer's business that are tendered by third parties. When some of these criteria are present, these persons are recognized as "workers" regardless of the nature of their contractual relationship, including contract labour. As regards the collective bargaining powers of contract workers supplied by the TWA-type (dispatching) agencies, collective bargaining normally takes place between these workers and the agency because the wages and other working conditions are normally determined in the employment contracts concluded between them.[2]

Where the workers concerned are individual subcontractors ("self-employed"), they have been entitled in some countries either to join existing unions or to establish their own unions vis-à-vis the user enterprises. In Australia, for example, the Industrial Relations Act 1991 (New South Wales) stipulates that groups of not fewer than 50 owner-drivers or carriers can register as an association in the Industrial Commission. The group can include a trade union. Associations of persons who contract with such drivers or carriers can also be registered (ss. 666 and 674C, respectively).[3]

However, "self-employed" persons are sometimes notoriously reluctant to join unions, which lessens the likelihood of union involvement.

Unionization of certain other categories of contract workers, such as homeworkers, might also become difficult, due to the high degree of dispersion of such workers.

### *The right to bargain collectively*

#### *Vis-à-vis the subcontractor*

Where the relationship between contract workers and subcontractors is an employment relationship, the workers are, in principle, entitled to the whole range of rights provided for in industrial relations and collective bargaining legislation, including fundamental workers' rights such as the right to organize and the right to bargain collectively. For example, in a number of countries (Belgium, Denmark, Finland, Germany and the Netherlands, for instance) the workers supplied by the TWA-type agencies negotiate collective agreements with these agencies.[4]

Of course, this formal legislative recognition of the collective rights of contract workers vis-à-vis their immediate employers does not guarantee by itself that these rights will automatically become a reality. This also depends on a number of practical circumstances, among which are the size of an enterprise, the trade union's presence in it and the level of unionization among its employees, the collective bargaining structure existing in a particular country (industry-wide, enterprise-level, or both), whether or not the immediate employer is a member of the employers' association and thus bound by the collective agreement, etc.

#### *Vis-à-vis the user enterprise*

Labour laws do not usually recognize the right of contract workers to negotiate with the user enterprises, if they are not their employers. Sometimes legislation establishes special provisions preventing user enterprises from being forced in the course of subcontracting arrangements to recognize the right of the workers of the subcontractors to bargain with the user enterprises. In the United Kingdom, for example, the Employment Act, 1982, prohibits conditions in tenders or contracts requiring the employment of union members or recognition of a trade union or negotiation with it (ss. 12 and 13). The Local Government Act, 1988, dealing with contracts for the supply of goods or services to any public authority, requires the public authority to exclude any "non-commercial" matters from the tender and contract with suppliers (s. 17). By virtue of this legislation, any attempt by the client to require specific standards from subcontractors regarding employment policies, industrial relations, training or even health and safety procedures is null and void.

The law of some other countries seems to give collective bargaining rights to certain categories of contract workers who are not employees of the user enterprises.

This is the case of workers supplied by TWA-type agencies, for example. The Act of 1989 on employment services of Switzerland, for example, provides that the workers thus supplied must be covered by the provisions of collective agreements in force in the user enterprises concerning wages and hours of work (s. 20). A similar provision is contained in the National Employment Act of 1991 of Argentina (s. 76).

The above-mentioned legally recognized right of individual owner-drivers or carriers to unionize in Australia (New South Wales) has proven to be an important precondition to get both the user enterprises and individual subcontractors involved in collective bargaining. In the transport industry of New South Wales, the Transport Workers' Union assists in negotiating agreements for owner-drivers.[5]

Such a recognition of the right of contract workers to bargain with the user enterprises may also take place by virtue of judicial decisions. For instance, in Japan, the workers supplied by TWA-type agencies normally engage in collective bargaining with the agencies, which are recognized by law as their employers and thus responsible for their conditions of work. However, in exceptional cases, where the user enterprise exercises substantial control, i.e. a decisional authority, over the working conditions of the dispatched workers, the judicial bodies have recognized the right of the workers concerned to bargain with the user enterprises.[6]

In practice, however, collective rights of contract workers can be affected by the working conditions existing in the user enterprises. For example, if in countries with industry-wide collective bargaining the subcontractor and the user enterprise belong to the same industrial sector, collective labour relations may in fact be similar for both the regular employees of the user enterprise and the workers of the subcontractor. Both groups of workers can belong to the same trade union and, having the same industry-wide bargaining table, they may strike together for the same reason. In Argentina, for example, collective agreements concluded in the footwear and clothing industries in 1989 and 1990, respectively, extended their coverage to homeworkers with regard to the following issues: (i) seniority pay; (ii) paid leave for the worker's holiday in the industry; (iii) provision of working clothes; (iv) death benefit.[7]

As has already been mentioned in Chapter IV, the coverage of contract workers by the collective agreements in force in the user enterprises often stems from the desire of the unions representing regular employees of the user enterprises to exclude the possibility of undermining the negotiated conditions of their employment by recourse to non-unionized contract workers.

### *Exercise of other collective rights*

Where the subcontractor and the user enterprise belong to different industries or if there is no industry-wide collective bargaining, the collective labour relations status of regular employees of the user enterprise and that of the subcontractor's workers are likely to be different. As a result, controversies may emerge over the exercise of collective rights of contract workers who are working under the control, supervision or direction of the user enterprises. An example is the right of workers to hold their staff meetings on the premises of the employer, which is provided for by the legislation of some countries. In Italy, for instance, workers are entitled to up to ten working hours per year for staff meetings on the premises of the employer (section 20 of Act No. 300 of 20 May 1970 to make provisions respecting the protection of workers' freedom and dignity, trade union freedom and freedom of action within the workplace, and provisions respecting placement). With regard to the exercise of this right by contract workers on the premises of the user enterprises, case-law does not seem to have come up with a universally accepted solution yet. While some judicial bodies believe that such workers should enjoy this right, others have taken the opposite position and

affirm that this right cannot limit the property right of a person who is not recognized as an employer of these workers.

### Representation rights

As in the case of union and collective bargaining rights of contract workers, their representation rights, including the right to elect and to be represented by representation bodies such as works councils, can also be regarded from two major perspectives, namely in relation to the subcontractors employing them and in relation to the user enterprises.

In countries where provision is made for workers' enterprise-level representation in bodies such as works councils, these are generally elected by the employees of the enterprise and establishment concerned and have a variety of consultation or co-determination rights in respect of those workers. Where contract workers are not formally employees of the enterprises, the question arises whether these workers can take part in the election of these bodies and whether these bodies can represent these workers.

In principle, it would seem that only employees are entitled to vote in such elections and to be represented by the bodies concerned. Where the law of the country concerned assimilates contract workers to such employees, they presumably also have these rights. Thus, contract workers who are employees of a subcontractor would have representation rights in the subcontractor's enterprise but not in the user enterprise, unless they were assimilated to employees of the latter enterprise.

In some countries the law makes explicit provision for this in respect of triangular relationships. In Luxembourg, for example, section 16 of the Act of 1994 regulating temporary work and secondment of workers provides that temporary workers shall not be entitled to vote for, or be elected as, staff delegates or workers' representatives on the works joint committee or the management council of the user enterprise. However, the Act entitles such workers to lodge a complaint and to consult staff delegates in the user enterprise.

### Industrial action

The possible involvement of contract workers in industrial action may be regarded from three major perspectives: (i) the right of contract workers to direct action; (ii) the extent to which an employer can use contract workers to dilute the impact of direct action taken by its regular employees or in the case of a lockout; (iii) the right of the employees of the user enterprises to take direct action to have contract workers removed from their worksite.

#### *The right of contract workers to direct action against subcontractors*

The practical implementation of the right of contract workers to industrial action against the subcontractors, where legally recognized, depends on a number of factors, the most important being the level of economic independence of such firms from the user enterprises and the bargaining powers of the workers concerned.

The greater the subcontractors' economic autonomy from the user enterprises, the stronger the organizational capacity of the workers concerned. Job security in such firms is less exposed to the economic behaviour of the user enterprises. A relatively remote fear of a shut-down of the subcontractor's operations, which might be a result of failure to continue the contractual relationship with the user enterprise, establishes an organizational climate in such firms which is more conducive to the unionization of the workforce. This is especially true in the high-tech industries, where qualitative considerations of production play a primary role and the relationship between the user enterprises and subcontractors is relatively stable and characterized by mutual dependency.

A certain amount of attention should also be given to the problem of whether or not contract workers can exercise their right to industrial action against the subcontractor, i.e. against their immediate employer, while working on the premises of the user enterprises. Theoretically, in the absence of provision in legislation, contract or collective agreement to the contrary, nothing formally prevents them from doing so, but little is known about the factual situation.

### *Restrictions on the use of contract labour during lawful strikes and lockouts*

An employer might seek to dilute the impact of a lawful work stoppage by hiring new contract labour to maintain operations at a plant where workers are on strike or have been locked out, or by assigning contract workers who are already engaged at the worksite to perform the work of the striking or locked out employees. The collective bargaining legislation of some countries places certain restrictions on such practices. For instance, in some provinces of Canada employers are denied the right to hire any replacement workers during a lawful strike or lockout, save those needed to perform "essential" work. This prohibition includes persons who are individual subcontractors ("self-employed") and employees of a subcontractor whose services are contracted in.

However, if the decision to replace striking or locked out employees by contract workers is justified by cost efficiency factors, there is no illegality, since employers are not precluded from making otherwise legitimate business decisions just because they happen to coincide with a strike or lockout. In this case, labour arbitration bodies carefully scrutinize the motives of the employer in contracting in an outside workforce to determine whether the decision was motivated by cost efficiency factors or by the desire to penalize the employees participating in the strike: in the latter case there would be an unfair labour practice as mentioned above.[8]

In the United States, the Executive Order of 8 March 1995 on permanent strike replacements provides that federal Government contracts should not be given to subcontractors that permanently replace lawfully striking workers.[9]

Among the TWA-type agencies of the Nordic countries, Denmark, Finland, Norway and Sweden, it is also a widely accepted practice not to let the workers supplied perform work while the user enterprises are subject to industrial action. This kind of restriction is laid down, for example, in the ethical code of the Danish Association of Temporary Work Agencies.[10]

### *Industrial action aimed at restricting the use of contract labour*

Provided that the union of the user enterprise strikes lawfully, it can thereby seek either to curtail recourse to contract labour or to regulate the terms on which the latter can be utilized. Nevertheless, if the union successfully persuades the employer to terminate existing contract labour arrangements in breach of the terms thereof, the subcontractor may be able in some countries (for example in Canada) to sue the union for the tort of inciting a breach of contract. If the union engages in an unlawful strike or unlawful picketing to persuade the employer to terminate contract labour arrangements, and the employer terminates them, the subcontractor may sue the union for the tort of interference with contractual relations by unlawful means.[11]

**Notes**

[1] ILO: *Freedom of association and collective bargaining*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report III (4 B) International Labour Conference, 81st Session, Geneva, 1994, paras. 58-59.

[2] Y. Mizumachi: *Regulations on contract labour in Japan*, report submitted for the ILO research project on contract labour, Mar. 1995, pp. 22-23.

[3] L. de Plevitz: *Contract labour in Australia*, report submitted for the ILO research project on contract labour, Mar. 1995, p. 57.

[4] "Atypical working patterns across the EC", in *IDS European Report*, No. 382, Oct. 1993, p. 20; R. Eklund: *Contract labour in Denmark, Finland, Norway and Sweden*, report submitted for the ILO research project on contract labour, Apr. 1995, pp. 40-43.

[5] L. de Plevitz, op. cit., p. 56.

[6] Y. Mizumachi, op. cit., p. 23.

[7] See A. O. Goldin: *Contract labour in Argentina*, report submitted for the ILO research project on contract labour, Apr. 1995, pp. 61-62.

[8] G. England: *Contract labour in Canada*, report submitted for the ILO research project on contract labour, Spring 1995, pp. 36-37.

[9] ILO: *Labour Law Documents*, 1995/2, 1995-USA 1, pp. 105-106.

[10] R. Eklund, op. cit., p. 47.

[11] G. England, op. cit., p. 36.

## CHAPTER VI

# INTERNATIONAL ACTION

### International labour standards

Few ILO instruments refer explicitly to contract labour. For example, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), calls for special measures to be adopted to ensure that the workers concerned, including "those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them" (Article 20 (3) (a)). The Labour Clauses (Public Contracts) Convention, 1949 (No. 94), includes in its scope of application public contracts for "work carried out by subcontractors" (Article 1 (3)). The essential purpose of the Convention is protection of the workers concerned from negative consequences of the competition between firms tendering for public contracts, by means of the insertion of appropriate labour clauses in such contracts. It therefore provides that such contracts "shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on . . ." (Article 2 (1)).

Some other ILO instruments, while making no explicit reference to contract labour, relate implicitly to it. These are, inter alia, the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), in so far as it might be applied to the private agencies engaged in the supply of labour; the Migration for Employment Convention (Revised), 1949 (No. 97), and its accompanying Recommendation (No. 86), since many migrant workers are engaged through contract labour arrangements; and the Plantations Convention, 1958 (No. 110) [and Protocol, 1982], setting out standards in an economic sector where contract labour has already been practised for a long time. To the extent that contracting-out of work based on economic or structural reasons would result in a loss of jobs, the provisions of Part III of the Termination of Employment Convention, 1982 (No. 158), and its accompanying Recommendation (No. 166) are also relevant. A number of the instruments which refer to safety and health issues address the situation of two or more employers (sometimes with explicit reference to subcontractors) at a worksite. Examples of this are Articles 6 (2), 16 and 17 of the Asbestos Convention, 1986 (No. 162), Article 2 (e) and in particular Article 8 of the Safety and Health in Construction Convention, 1988 (No. 167), and Article 12 of the Safety and Health in Mines Convention, 1995 (No. 176).

It should also be noted that the question of revision of Convention No. 96 has been placed on the agenda of the 85th Session of the International Labour Conference.

## CALLS FOR INTERNATIONAL ACTION

Since the 1950s several ILO industrial committees have expressed their concerns about problems arising in connection with contract labour. Special reports on contract labour have been considered by the Second Tripartite Technical Meeting for the Clothing Industry in 1980 and by the former Petroleum Committee in 1973. The issue was mentioned, for example, by the Committee on Work on Plantations in 1989 and 1994, the Forestry and Wood Industries Committee and the Food and Drink Industries Committee in 1991, the Inland Transport Committee, the Building, Civil Engineering and Public Works Committee, the Tripartite Technical Meeting for the Leather and Footwear Industry, and the Iron and Steel Committee in 1992, the Committee on Salaried Employees and Professional Workers, and the Metal Trades Committee in 1994, and the Chemical Industries Committee in 1995. A number of conclusions and resolutions addressing contract labour have been adopted. They call for appropriate measures to be taken in order to provide the workers engaged with adequate protection. For example, the Building, Civil Engineering and Public Works Committee has identified contract labour as its highest priority for ILO action. Some of these conclusions are reproduced in the Annex to this report.

### *Conclusions resulting from the review of national law and practice*

Contract labour consists of a variety of patterns of labour force utilization which originally came into existence long ago in various countries and parts of the world as a response to labour market demand where intermittent (casual or seasonal) work was concerned. In the course of time, it has been increasingly resorted to in different occupations and economic sectors. Technological development and new patterns of work organization have facilitated this trend, as have the decentralization, deregulation and specialization of economic and labour markets currently reported worldwide.

Patterns of contract labour range from apparently commercial-type subcontracting aimed at performing work for or providing services to a user enterprise (job-contracting) to subcontracting arrangements the main or sole purpose of which is to supply workers to a user enterprise through a third party, frequently called an "intermediary" [1] or a "labour contractor or subcontractor" (labour-only contracting). There are also variations of contract labour arrangements which display characteristics of both of these patterns in different combinations and which cannot be easily identified as either job contracting or labour-only contracting. Such arrangements are often informal; in these cases the intermediary which supplies workers to a user enterprise may not be an established firm or business and its legal status is difficult to identify. The employee status of the workers involved is thus also unclear. As a result, many such workers frequently do not enjoy the protection provided by labour and social security laws and regulations.

With the growing recourse to contract labour, the need to establish adequate legislation that would respond suitably to flexibility concerns of labour markets and protect the workers involved is also becoming increasingly manifest. In many instances, existing labour and social security laws and regulations which were originally designed to address "standard" employment patterns have proven to be inadequate to regulate various "non-standard" forms of employment, including contract labour, to the benefit of both employers and workers involved.

Contract labour is an area in which not only the interests of contract workers engaged require better protection, but the interests of the regular employees of the user enterprises may also need to be safeguarded, especially in so far as their job security is concerned.

Attempts to regulate contract labour with a view to eliminating its possible negative consequences for the workers engaged, on the one hand, and to responding adequately to current labour market concerns, on the other hand, have had limited success so far. With the rapid expansion and increasing diversification of contract labour practices, this challenge is becoming more and more apparent. Countries are increasingly seeking to meet this challenge through well-balanced and effective regulations and practices.

The role of labour legislation in the regulation of contract labour arrangements is of considerable importance, especially in so far as guarantees of fundamental workers' rights and freedoms are concerned. However, the potential of legislation in this area has certain limits stemming from the specific nature of the subject under regulation. These limits relate to: (i) the variety of patterns (for example, bipartite and tripartite, or "triangular" relationships between the workers engaged and those who employ them; job-contracting and labour-only contracting, or mixed arrangements; different kinds of intermediaries involved, etc.); (ii) lack of conceptual clarity in as to the definition of the phenomena to be regulated, the scope of regulation and the major approaches to regulation; (iii) the difficulty of drawing a clear distinction between the domains of labour and commercial legislation, respectively; (iv) the high incidence of contract labour in the informal sector, which is difficult to regulate; (v) a manifest need to avoid undermining business activity by unwarranted intervention in what are truly commercial relationships.

Therefore, while legislative protection needs to be carefully formulated to take into account these characteristics of contract labour, it must be supplemented by more flexible and dynamic methods of implementation. That is why case-law, both of judicial bodies and of labour arbitration bodies (where they exist), has become an indispensable element of this machinery.

Collective bargaining, as well as other workers' representation forums, also have a role to play in providing the social partners with the machinery enabling them to balance their interests with regard to the regulation of contract labour arrangements.

The particularities of contract labour arrangements also call for new approaches to be sought in collective bargaining practices. Traditional trade union organization and action by industrial sector, which is still a major characteristic of the labour relations systems in many countries around the world, may prove to be too remote from workplaces where contract labour arrangements actually occur and thus may not be sufficient to provide the workers affected with the protection they need. In this regard, the role of enterprise-level collective bargaining should be especially emphasized.

Contract labour has both general and specific features stemming from the particularities of each individual country, economic sector or workforce involved, etc. Many contract labour arrangements are characterized by a significant degree of uncertainty as regards the employment status of the workers. This problem is threefold. First, it concerns the relationship between these workers and the user enterprises for which they actually work. While they are regarded by such enterprises as an outside workforce with a status different from that of their regular employees,

contract workers find themselves highly dependent on these enterprises to a degree similar to regular workers, with regard to a number of important conditions of their employment.

Second, the relationship between contract workers and a "third" (intermediary) party to many contract labour arrangements, i.e. a supplying agent or agency, is often far from being clearly understood and regulated, with the exception in many countries of TWA-type agencies, which are regarded by legislation as employers of the workers engaged.

Third, contract labour has generally not yet been adequately addressed by legislation, collective bargaining or administrative control. Attempts to fill the gap left by inadequate regulation by means of the case-law of judicial and labour arbitration bodies have had limited success so far. This is largely the result of difficulties stemming from the very nature of this phenomenon, which allows it to be given contradictory interpretations by these bodies in the course of implementing underdeveloped law. There is thus a need for adequate legislative regulation of contract labour arrangements.

Many national legal and labour relations systems are still searching for an appropriate balance between the application to contract labour arrangements of the regulations designed for a "standard" employment relationship and the establishment of specific regulations to govern this pattern of labour utilization.

The following discussion and the questions contained in the questionnaire regarding the possible form, scope, definitions and content of any new international standard or standards on contract labour are based on the information obtained from the research undertaken recently by the ILO and the summary and analysis of this research in the present law and practice report.

In defining the scope and content of an international standard or standards on contract labour, two major problems arise: first, the identification of the relationship between the workers concerned and the other party or parties to the relationship (subcontractor or intermediary and user enterprise when there are two other parties) that qualifies the relationship as a contract labour relationship attracting the protection of the international instrument or instruments, rather than as a normal employment or commercial relationship; and second, the determination of the nature of the substantive protection to be afforded to the workers concerned.

As far as the first issue is concerned, the review of national law and practice on the subject has shown how difficult it is to define the phenomena concerned. The wide range of definitions in national legislation have two principal characteristics in common: the absence of a normal employment relationship between the worker and the user enterprise and the economic and/or organizational dependency of the worker on the user enterprise. Thus, a wide variety of what might otherwise be viewed as normal commercial relationships between user enterprise and subcontractor are considered to be contract labour subject to special protection when the subcontractor providing workers to perform work or provide a service (job-subcontracting) does not have the economic and financial viability to meet its obligations to the workers concerned and/or the workers concerned are more dependent economically and/or organizationally on the user enterprise. Likewise, special protection applies when a user enterprise obtains workers to perform its normal work through a wide variety of intermediaries (labour-only subcontracting) and the workers are in fact dependent upon the user enterprise. The questionnaire seeks to determine whether a definition

based on these criteria is appropriate for establishing the essential scope of the instrument or instruments (question 5 (1)-(5)). Question 5 (6) seeks to indicate possible criteria for determining whether a worker is sufficiently dependent upon a user enterprise to justify providing him or her with the protection of any instrument or instruments adopted.

A related question concerns the relationship between any new instrument or instruments on contract labour and the revision of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96). As the law and practice report on the latter, based on the conclusions adopted by the 81st Session (1994) of the International Labour Conference on the role of private employment agencies, envisages establishing general principles to govern private employment agencies in the functioning of labour markets, it is important to ensure, as far as possible, that there is no conflict between any revision of Convention No. 96 and any new standards on contract labour. The essential area of potential overlap concerns contract labour through intermediaries. The questionnaire below seeks to avoid an overlap with any revision of Convention No. 96 by ensuring that the intermediaries referred to in the present questionnaire do not fall within the definition of private employment agencies covered in the questionnaire on the revision of Convention No. 96. Thus, the workers placed by private employment agencies in enterprises which become their employers (covered by the revision of Convention No. 96) are by definition not contract workers, since the latter are not formally employees of user enterprises (question 5 (2) (b)). Nor are temporary work agencies which employ the workers they supply to user enterprises (covered by the revision of Convention No. 96) intermediaries within the meaning of the contract labour questionnaire, since such intermediaries are excluded from the definition of intermediary (question 5 (4)). It would seem legitimate to exclude this type of intermediary (temporary work agencies employing the workers they supply) from any possible contract labour instrument or instruments, as the clear employment status of these workers would tend to ensure that labour and social security law applies to them, and as the revision of Convention No. 96 would provide them with significant protection.

The questionnaire also sets forth different ways in which protection may be provided to contract workers, on the basis of the widely varying approaches adopted in different countries. Particular forms of contract labour may be prohibited or be subject to licensing or registration arrangements. Others are not necessarily subject to such limitations but to regulations according to which the user enterprise must provide equal treatment with its employees and/or must share liability or responsibility with the subcontractor or intermediary for fulfilling financial and other obligations towards the contract worker. The essential objective of these various approaches is to ensure that contract workers are not deprived of essential protection because of their indeterminate status, and that they enjoy basic protection in a number of matters of essential concern.

As there seems to be no general consensus among countries regarding how best to protect contract workers, it would seem that any new instrument or instruments on the subject should be very flexible and allow member States to choose among different approaches to providing the needed protection.

This objective also has a bearing on the form of the instrument or instruments that might be adopted. If any new instrument or instruments on contract labour need to allow member States flexibility in providing contract workers with needed protection,

then there would seem to be two possible options as regards the form of the instrument or instruments to be adopted. The first and most flexible approach would be to adopt a Recommendation on the subject. A Recommendation could provide important guidelines to member States regarding the ways in which they might provide needed protection to contract workers, while leaving them maximum flexibility in choosing what approaches to adopt and in adapting these approaches to the particular situation in each. In the course of the following five or ten years, the national laws, regulations and practices thus developed on the basis of a Recommendation might provide clearer patterns that could lay a solid foundation for the adoption of a Convention that would be widely acceptable.

The second approach to providing the needed flexibility would be to adopt a Convention supplemented by a Recommendation, with the Convention laying down the basic principles that should apply to the protection of contract workers and the Recommendation the various approaches to implementing these principles through national law and practice.

The adoption of a more detailed Convention or of a Convention alone would provide less flexibility. The existing conceptual uncertainties regarding the phenomenon and the underdeveloped state of national laws, regulations and practices on the subject, together with the still limited knowledge base, might result in a standard which receives a very low level of ratification and has little effect on national law and practice.

The following questionnaire has been designed with a view to the drafting of Proposed Conclusions that will meet the concerns of member States as regards both the form and the content of possible international instruments.

**Note**

[1] In ILO instruments the term "intermediary" has traditionally been applied to both recruitment (placement) and labour supply activities. Examples are Article 9 of the Protection of Wages Convention, 1949 (No. 95); Article 1 (a) of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96); and Article 32 of the Plantations Convention, 1958 (No. 110).

## QUESTIONNAIRE

In accordance with article 39 of the Standing Orders of the International Labour Conference, governments are requested to consult the most representative organizations of employers and workers before finalizing their replies to the following questionnaire and to give reasons for their replies. The replies are to reach the International Labour Office in Geneva by 30 June 1996 at the latest.

In preparing their replies, governments should bear in mind that the 85th Session of the International Labour Conference will also have on the agenda the revision of the Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), and they should therefore take into account the need to ensure consistency in any instruments adopted on these two matters.

### I. Form of the international instrument or instruments

*1. Should the International Labour Conference adopt an instrument or instruments concerning contract labour?*

*2. If so, should the instrument or instruments take the form of:*

*(a) a Convention?*

*(b) a Recommendation?*

*(c) a Convention supplemented by a Recommendation?*

### II. Preamble

*3. Should the Preamble to the instrument or instruments recognized that, having regard to the growing importance of contract labour, it would be appropriate to adopt new standards on the subject with a view to providing the workers concerned with adequate protection?*

### III. Methods of application

*4. Should the instrument or instruments stipulate that their provisions should be applied by means of laws or regulations, collective agreements, arbitration awards, court decisions or any other manner consistent with national practice?*

### IV. Definitions

*5. For the purpose of the instrument or instruments:*

*(1) Should the term "contract labour" mean work carried out by a contract worker for a natural or legal person (referred to below as a "user enterprise")?*

*(2) Should the term "contract worker" mean a person who:*

*(a) performs work or provides services to a user enterprise:*

*(i) directly as an individual subcontractor? or*

*(ii) as an employee of a subcontractor? or*

*(iii) through an intermediary? and*

*(b) who is in a condition of substantial economic and/or organizational dependency on the user enterprise without being formally an employee of that enterprise?*

*(3) Should the term "subcontractor" mean any natural or legal person who contracts to have work performed or a service provided to a user enterprise?*

*(4) Should the term "intermediary" mean any natural or legal person who supplies a contract worker to a user enterprise, except where the intermediary is formally the employer of this worker?* [1]

*(5) Should the instrument or instruments provide that Members should, with reference to subparagraph 2 (b) above, determine the criteria for deeming that a person is in a condition of substantial economic and/or organizational dependency on the user enterprise?*

*(6) Should the instrument or instruments provide that, in making the determination referred to in subparagraph (5) above, Members might consider one or more of the following criteria:*

*(a) the extent to which the work performed or the services provided by the person concerned is integrated into the user enterprise's normal activities?*

*(b) the extent to which the user enterprise provides the capital, machinery, equipment and/or materials needed to perform the work or provide the services concerned?*

*(c) the extent to which the user enterprise determines where the work is performed or the services are provided?*

*(d) the extent to which the user enterprise provides the instructions or training required to perform the work or to provide the services concerned?*

*(e) the extent to which the user enterprise exercises supervisory authority over the person concerned in relation to the work performed or the services provided?*

*(f) the extent to which the user enterprise determines working time and other conditions of work?*

*(g) the extent to which the user enterprise is entitled to exercise disciplinary authority over the person concerned in relation to the work performed or the services provided?*

*(h) other (please specify)?*

## V. Scope

*6. (1) Should the instrument or instruments apply to all branches of economic activity?*

*(2) If not, should the instrument or instruments apply to particular branches of economic activity? If so, please specify the branches.*

*(3) In the case of a Convention, should it provide that a Member may exclude from its scope particular branches of economic activity? If so, should the Member be required to indicate in its first report under article 22 of the Constitution of the International Labour Organization the branch or branches excluded?*

*7. Should the instrument or instruments provide that its or their provisions do not affect more favourable provisions in other international instruments applicable to the workers concerned?*

## VI. Content of the instrument or instruments

*8. Should the instrument or instruments provide that Members should take appropriate measures with a view to ensuring that contract workers enjoy adequate protection with respect at least to the following issues:*

*(a) the right to organize and to bargain collectively?*

*(b) protection against discrimination in employment and occupation on the basis of race, colour, sex, religion, political opinion, national extraction or social origin?*

*(c) minimum age?*

*(d) remuneration?*

*(e) working time and other conditions of work?*

*(f) occupational safety and health?*

*(g) maternity protection?*

*(h) social security coverage, where it exists?*

*(i) compensation in case of occupational accident or disease?*

*(j) other (please specify)?*

*9. Should the instrument or instruments provide that statistics and other information on contract labour should be compiled by each Member, kept up to date and made publicly available?*

*10. Should the instrument or instruments provide that effective measures should be taken to ensure that contract workers are informed in an appropriate and easily understandable manner of their remuneration (or how it will be determined) and the conditions of employment and work that will be applicable to them?*

*11. (1) Should the instrument or instruments provide that contract labour might be prohibited in circumstances specified by national law?*

*(2) If so, in which circumstances might contract labour be prohibited?*

*(3) Might these circumstances include:*

*(a) hazardous occupations?*

*(b) replacement of workers participating in a lawful strike?*

*12. (1) Should the instrument or instruments provide that recourse to contract labour should, in circumstances specified by national laws or regulations, be subject to an obligation incumbent on the subcontractor and/or the intermediary to register with or obtain a licence from the competent authority?*

*(2) If so, in which circumstances?*

*(3) If so, should registration or licensing depend upon the subcontractor and/or intermediary demonstrating its viability as a business and capacity to meet its obligations to the contract workers concerned, or posting a bond sufficient to cover its obligations to the workers concerned?*

*13. (1) Should the instrument or instruments provide that measures should be taken to ensure that contract workers, or particular categories of contract workers, should be afforded, in specified circumstances, equal treatment with employees of the user enterprise or should be assimilated to employees of the user enterprise or, as the case may be, to employees of the subcontractor or the intermediary?*

*(2) If so, in which circumstances (for example, where contract labour is used mainly or solely for the purpose of denying rights under labour or social security laws and regulations)?*

*14. (1) Should the instrument or instruments provide that, in circumstances specified by national law, financial obligations toward a contract worker should be jointly and severally [2] shared by the subcontractor and the user enterprise, or by the intermediary and the user enterprise, as the case may be?*

*(2) If so, in which circumstances?*

*15. (1) In the absence of joint and several liability, should the instrument or instruments provide that, when a contract worker is supplied to a user enterprise by a subcontractor or an intermediary, and when the party normally responsible for fulfilling the financial obligations towards the contract workers does not meet them, the other party should, in specified circumstances, be responsible for doing so?*

*(2) If so, in which circumstances?*

*16. (1) Should the instrument or instruments provide that, in circumstances specified by national laws and regulations, national law and practice may apportion responsibility between the subcontractor and the user enterprise, or between the intermediary and the user enterprise, as the case may be, for fulfilling towards contract workers the obligations that are normally incumbent upon an employer?*

*(2) If so, in which circumstances?*

*17. (1) Should the instrument or instruments provide that the obligations and responsibilities regarding occupational safety and health under national laws and regulations, including the obligation to maintain a safe and healthful workplace, should fall upon the enterprise, whether user or subcontractor:*

*(a) in the premises of which the work is carried out?; or*

*(b) which is responsible for the machinery, equipment, tools and/or materials used in performing the work?*

*(2) Should the instrument or instruments provide that the responsibility under national laws and regulations for compensating workers in case of occupational accidents and diseases (when this is not covered by a social insurance scheme) should fall upon the enterprise, whether user or subcontractor:*

*(a) in the premises of which the work is carried out?; or*

*(b) which is responsible for the machinery, equipment, tools and/or materials used in performing the work?*

*18. (1) Should the instrument or instruments provide that, in circumstances specified by national laws and regulations, the subcontractor and the user enterprise, or the intermediary and the user enterprise, should be jointly and severally liable for the social security contributions concerned?*

*(2) Should the instrument or instruments provide that, in the absence of joint and several liability, if the party normally responsible for social security contributions does not make them, the other party should be liable for making them?*

*19. Should the Convention provide that implementation of the laws and regulations applicable to contract workers should be ensured through labour inspection?*

*20. Should the Convention provide that adequate remedies, including penalties, for violation of the laws and regulations should be provided for and effectively applied?*

## VII. Special problems

*21. (1) Should the instrument or instruments provide that Members should take measure to provide appropriate protection to contract workers who are to perform work in a country other than their own?*

*(2) If so, which measures?*

*22. (1) Are there any particularities of national law and practice which, in your view, are liable to create difficulties in the practical application of an international instrument or instruments as conceived in this report?*

*(2) If so, how would you suggest that those difficulties be met?*

*23. (Federal States only.) Do you consider that, in the event of a Convention being adopted, the subject-matter would be appropriate for federal action or wholly or in part for action by the constituent units of the federation?*

*24. (1) Are there, in your view, any other pertinent problems not covered by the present questionnaire which ought to be taken into consideration when the instrument or instruments are being drafted?*

*(2) If so, please specify.*

**Notes**

[1] If the intermediary is formally the employer of the worker (e.g. a temporary employment agency) or provides placement services whereby the worker it supplied becomes the employee of the user enterprise, it is proposed to have this situation addressed by the revision of the Fee-Charging Employment Agency (Revised) Convention, 1949 (No. 96).

[2] For explanation, see p. 49 of the report.

ANNEX

# SELECTED CONCLUSIONS AND RESOLUTIONS CONCERNING CONTRACT LABOUR ADOPTED BY ILO INDUSTRIAL COMMITTEE MEETINGS

## PETROLEUM COMMITTEE

*(Fifth Session, Caracas, April-May 1955 and Geneva, April 1956)*

### Resolution (No. 44) concerning conditions of employment of contract labour in the petroleum industry

The Petroleum Committee of the International Labour Organization,

...

Recognizing the fact that while it is the practice of oil undertakings to employ directly those workers who do work that is normally performed by the undertaking, it is also their practice in a number of countries to assign, on a contract basis, certain types of work which are not part of, or directly related to, their normal operations or which are of an irregular or temporary nature, to other firms or individual employers, i.e. "contractors" who in order to undertake such work employ workers known as "contract labour",

Recognizing further that in a number of countries some undertakings contract work which is of a permanent character and that there is a general tendency to increase the amount of such work being given to contractors,

Being aware that contract labour and workers directly employed by an oil undertaking sometimes perform the same kind of work directly or indirectly for the same undertaking, and that sometimes, especially in the less-industrialized countries, contract labour may be employed under circumstances which are less favourable than those of the workers directly employed by an oil undertaking,

Noting that where serious disparity in the standards of employment of these two groups of workers exist, serious problems are sometimes created which would tend to undermine normal and harmonious relations, with consequent discontent,

Believing that such discontent is undesirable and that a remedy lies in ensuring that contract labour enjoys a fair and reasonable standard of employment and considering that the contractor, as the employer of his workers, is primarily responsible for the conditions of work of the contract labour, but at the same time the oil undertaking also has a concern because contract labour performs work for the oil industry,

Considering, further, that working conditions of the contract labour engaged in the oil industry should be regulated by collective agreements freely negotiated between the organizations of workers and employers, but that, where such organizations do not

yet exist or where the development of industrial relationships has not reached a stage where the negotiation of such agreements is possible, the responsibility for ensuring fair standards of employment within the contracting industry should rest with the public authority;

Adopts this thirteenth day of April 1956 the following resolution:

*Action by public authorities*

1. Governments should ensure that there is adequate legislation to protect the conditions of employment of contract labour. Such legislation may include licensing of contractors, taking into account financial performance guarantees in issuing such licences.

2. In the absence of trade unions or collective agreements, compulsory written contracts of service, covering all conditions of employment and remuneration, should be made between the contractor and his workers. A contract should not include any clause which would limit the employee in the exercise of his right to join a union of his own choice.

3. Governments should ensure that the legal minimum standards of employment concerning contract labour are effectively applied by organizing an adequate and efficient system of labour inspection.

4. There should be effective application of penalties for violation of legal provisions.

*Action by oil undertakings*

5. Work directly associated with the technical processes of the oil undertaking for the performance of which equipment and present employees are available should not be contracted out except in unusual circumstances.

6. Contracts entered into by the oil undertaking and the contractor should include a clause requiring the contractor to provide fair wages and working conditions for the contract labour.

7. The contractor should provide or arrange, in cooperation with the oil undertaking, if necessary, for adequate medical and supply facilities for contract labour when operating in remote and underdeveloped areas.

8. Where work for the oil undertaking is conducted in remote or isolated areas and recreational facilities are provided to employees by the oil undertaking, the contractor should arrange that some of these facilities be made available for the use of his workers and their families provided they can be accommodated.

9. The oil undertaking should take effective steps to see that the provisions contained in the contract concerning the working conditions of contract labour are complied with by the contractor.

10. In areas where there is unemployment, it is desirable that the undertaking encourage the contractor to take steps to stabilize his employment and to prevent, in so far as possible, the arbitrary discharge of workers during the period of contract.

## PETROLEUM COMMITTEE

*(Eighth Session, Geneva, April 1973)*

### Conclusions (No. 65) concerning social problems of contract, subcontract and casual labour in the petroleum industry

The Petroleum Committee of the International Labour Organization,

...

Recalling that the Petroleum Committee at its Fifth Session at Caracas in April-May 1955 and at Geneva in April 1956 adopted unanimously a resolution (No. 44) concerning conditions of employment of contract labour in the petroleum industry,

Noting that the provisions of that resolution have not been implemented everywhere in the petroleum industry and that the conditions to which it referred, which are prejudicial to the interests of workers in the industry, still exist in certain areas,

Considering that there is a tendency for the contracting out of work to increase in both the public and private sectors of the petroleum industry because of technical changes requiring highly specialized personnel and equipment; that maintenance of equipment and other operations related to production processes as well as auxiliary services and clerical work, which were formerly performed by regular, permanently employed workers of oil undertakings, are frequently contracted out; that new forms of contract labour have developed and that the employment of temporary personnel through the medium of temporary-help agencies or other types of labour-supply contractors is also on the increase in a number of countries,

Considering that the contracting out of work in the oil industry is often indispensable because of technical imperatives, and that this practice may have useful employment-creation effects and facilitate the transfer of technological know-how for the economic and social benefit of other countries,

Considering also that the increased use of contract labour may result in a lessening of the number of regular workers employed in the undertakings,

Considering, further, that working conditions of the contract labour engaged in the oil industry should be regulated by law and/or collective agreements freely negotiated between the organizations of workers and employers,

Believing that governments, employers' and workers' organizations alike in the petroleum industry have a common interest, for economic, social and humanitarian reasons, in helping to ensure that contract workers are employed in satisfactory conditions and that contract labour practices do not undermine industrial relations,

Noting also that similar problems may arise in other industries with regard to the use of contract and casual labour;

Adopts this thirteenth day of April 1973 the following conclusions:

1. Taking into account national conditions, efforts should be made by the public authorities and the oil industry in order to better protect those contract, subcontract and casual workers who are not adequately protected by legislation or collective

agreements, giving special regard to labour contracting, in which context licensing of contractors or other limitation or even abolition might be considered if appropriate.

2. Work involved in the technical processes of the industry, for the performance of which equipment and permanent employees are available or can easily be made available in the undertaking concerned, should not be contracted out except in unusual circumstances. Such unusual circumstances might include, for example, installation or revision work.

3. The employment of temporary or casual workers through labour supply contractors, including temporary help agencies, should be limited to temporary or unforeseeable needs for personnel: oil undertakings should, in any case, carry a sufficient complement of permanent workers to meet normal absences.

4. In cases in which the interests of the regular employees are or may be affected by contracting out, they or their representatives should be informed by the oil undertaking beforehand.

Where there exist procedures of consultation or of collective bargaining applicable to the undertaking, full use should be made of such procedures.

5. Contracts entered into by the oil undertaking and the contractor should include a clause requiring the contractor to provide fair wages and working conditions for the contract labour.

6. Governments should ensure that statutory minimum standards regarding conditions of employment, including health and safety, are applicable to contract and casual labour and are effectively applied to such workers, such application to include sanctions for violations of legal provisions.

7. Where contract work is carried out at remote or isolated sites, particular attention should be paid by the public authorities to the need for ensuring respect of statutory standards regarding conditions of work and safety and health; the contractor should provide or arrange, in cooperation with the oil undertaking, if necessary, for adequate medical and supply facilities and accommodation for contract labour when operating in such remote or isolated sites.

8. Where necessary, efforts should be made to guarantee to workers in contract and casual employment the full enjoyment of trade union rights.

9. Appropriate protection against unjustified dismissal should be applicable to contract and casual workers.

10. A limit may be fixed by collective agreement on the duration of employment of casual or temporary workers employed by oil undertakings; these workers may be integrated into the regular workforce after a certain period of time worked in the same undertaking.

11. Workers employed by contractors on the construction of new installations for the oil industry should, where appropriate, be offered permanent employment in those new installations when they become operational, after suitable training.

12. The oil undertakings should provide adequate vocational training, further training and retraining for their employees so that specialized personnel requirements

may be filled as far as possible by promotions or transfers of regular workers rather than by recourse to temporary personnel or to contractors.

## SECOND TRIPARTITE TECHNICAL MEETING FOR THE CLOTHING INDUSTRY

*(Geneva, 23 September-2 October 1980)*

### Conclusions (No. 7) concerning contract labour in the clothing industry

The Second Tripartite Meeting for the Clothing Industry:

...

Adopts this second day of October 1980 the following conclusions:

*General considerations*

1. Traditionally and even historically the clothing industry is characterized by seasonal cycles and the need for flexibility to meet changes in fashion and is thus subject to sudden increase and decrease in demand. It is therefore one of the industries where contract labour, including homeworkers, is relatively common in many countries particularly since it is a highly labour-intensive industry. In addition the liberalization of trade, which has occurred since the first Tripartite Technical Meeting for the Clothing Industry was held in 1964, has resulted in a growing internationalization in the production of clothing. Subcontracting has gone beyond the national context, and has led to the manufacture of complete items of clothing or parts thereof by the subsidiaries, located in developing or even in developed countries, of multinational companies based in industrialized countries. As for labour-only subcontracting, which is based on the provision of labour rather than on a given production, it is not possible to be identified. However, there are cases of intermediaries who provide work to be done at home.

2. A clear definition and precise delineation of the different forms of contract labour is not always possible. One notes overlapping between one form and another and, on the whole, subcontracting is as much an economic and managerial concept as a legal one. Certainly, simple purchasing by retailers or by wholesalers and other undertakings in the commercial sector are operations of pure commerce. However, sometimes some wholesalers and retailers become involved in design, in providing fabric and in undertaking cutting, arranging for the rest of the production to be carried out through subcontracting according to a set of specifications, and assuring the marketing. In other cases, manufacturers modify the structure of their enterprise or diversify their activities, and thus it is not easy to know when they are producing, contracting-out or simply buying and selling. Moreover, it is not uncommon that subcontracting comprises several degrees with one subcontractor giving in his turn work to other subcontractors. It is also not uncommon that subcontracting (sometimes through the intervention of intermediaries) ends in home work, which is appropriate to consider also in the framework of contract labour problems.

3. Any examination of the questions under consideration is handicapped by a lack of relevant studies and of complete, reliable and up-to-date statistics, and it is urged

that this situation be remedied as soon as possible. This lack of reliable data may be due to some contract labour being undeclared in order to avoid taxes or social insurance contributions, or to the existence of clandestine labour or workers in an irregular situation, such as migrant workers without a residential or work permit. On the other hand, whatever the measures that may be adopted, their enforcement may be difficult, especially due to the dispersal and diversity of small subcontracting enterprises and homeworkers — a situation which does not facilitate trade union organization and control.

4. The ILO should appeal to member States to provide appropriate statistics which would facilitate further consideration of these questions at a future meeting.

5. Since developments have been and are rapid in the clothing industry, the Meeting considers that it would be desirable for the problems of the clothing industry to be given more frequent and comprehensive attention by the ILO.

*Subcontracting within the national context*

6. Because of the often complementary relationship between the artisanal or informal (called "non-structured") sector and the industrial sector, subcontracting within countries continues to grow. Some of the reasons for this have been mentioned above. Other reasons include the use of surplus capacity of production by manufacturers to undertake subcontracting for other enterprises, the expansion of choice in a range of clothing due to the use of specialized subcontractors, the limited capital and equipment requirements (which may be purchased second-hand or rented), which often enable persons to start production of clothing, especially where only a limited range of series are to be manufactured. Subcontracting often represents a substantial proportion of the internal production of clothing, with marked differences according to country and categories of clothing.

7. Although the resulting flexibility may offer advantages, and whilst numerous small enterprises, which generate employment, function without any special difficulties, certain problems do arise in varying circumstances. Indeed, this may on occasion lead to unfair competition between enterprises and inequality of treatment between their workers regarding social and labour standards, conditions of work and occupational safety and health, which are applied by some employers and perhaps not by others. The causes for these may be the absence of collective agreements or legislation, which do not always cover all enterprises, or non-compliance with such provisions, due sometimes to the difficulties of enforcement. Failure on the part of any employer to fully observe legislation or collective agreements cannot in any way be condoned. In addition, job insecurity, especially serious in a period of economic crisis, affects a number of workers employed by contractors and subcontractors, who depend to a large extent on the orders of principal firms and who rarely have solid financial reserves. Subcontracting in some cases may imply inferior remuneration and working conditions, aggravated by pressure on the productivity of the worker and/or the urgency of delivery dates, which may be unfavourable to the workers, especially female labour.

8. As a matter of principle, the advantages of subcontracting should not be obtained at the expense of the workers — neither by the principal nor by his subcontractors — nor result in unfair competition between enterprises. It is noted that

in certain countries provision is made for joint liability of the principal employer (which may be limited in certain cases), as for example in the case of bankruptcy, where the subcontractor is unable to meet his obligations towards his employees, especially with respect to wages and social security contributions. At least labour and social security laws and regulations should be applicable to workers of all subcontractors. In cases where collective agreements are signed, it is desirable that the parties should negotiate, wherever practicable, that terms of employment and conditions of work provided therein as well as fringe benefits which are stipulated, be applicable without discrimination to all workers. Principal employers should make use, to the maximum extent possible, of subcontractors who are party to such collective agreements.

*International subcontracting*

9. International subcontracting is expanding to a growing number of countries and it is not confined to a few newly industrializing countries. It is developing because of the comparative advantages resulting from differences in labour costs (basic salary and wage supplements or social insurance) prevailing between countries of the North and South, and of the West and the East. However, statistics in this respect must be interpreted with caution, and account should be taken of, inter alia, problems of exchange rates and of differing costs of living and conditions of life. International subcontracting quite often takes the form of outward processing, e.g. the temporary export of cut pieces to be assembled and re-imported, with customs duties being paid only on the value added. Moreover, within the framework of export-oriented policies and concessions to attract foreign investors, there is a mushrooming of free trade zones, or analogous special systems for enterprises producing for export in developing countries. The main goal of developing countries in undertaking subcontracting is to relieve unemployment and the shortage of foreign exchange for purchasing abroad; besides, the clothing industry is labour intensive and requires less capital investment and lower skill levels than other industries. None the less, since these practices at times involve certain exemptions (e.g. fiscal) over a fixed period and are becoming more widespread, thus leading to increasing competition, rapid displacement of such comparative advantages from one country to another may occur. This leads to instability in jobs thus created in the subcontracting countries in addition to job insecurity deriving from international subcontracting in the industrialized countries of the principals. This is the effect of free trade.

10. The Declaration of Philadelphia concerning the Aims and Purposes of the International Labour Organization, which is an integral part of its Constitution, states, inter alia, "poverty anywhere constitutes a danger to prosperity everywhere". There is a risk of a strengthening of protectionist tendencies if international subcontracting leads to an excessive loss of jobs as a result of serious difficulties of adjustment in the countries of the principals. The advantages that international subcontracting may provide to enterprises should also be of benefit to consumers and should result in an improvement in the terms and conditions of employment of those working in the industry in developing countries, thereby enhancing the demand for clothing items on the internal markets of these countries.

11. To this end, workers employed as contract labour within the framework of international subcontracting, including those in free trade zones, should at least be

covered without discrimination by the labour and social security laws and regulations of their country. They should also enjoy the exercise of basic rights such as trade union rights, minimum wage regulations and social protection.

12. The Meeting took note of the suggestion concerning a study to be carried out by the ILO on whether it is possible to define a set of minimum international labour standards which should be applied throughout the world, and the enforcement of which the ILO could supervise.

13. The ILO should undertake a study which would provide better knowledge on questions related to free trade zones and analogous systems which are within its competence, in particular freedom of association and minimum wages, in comparison with the situation which applies in the other parts of the relevant countries.

*Labour-only subcontracting*

14. Apart from intermediaries that are found in connection with industrial home work in various countries, labour-only subcontracting has become less common in the clothing industry currently; in fact a number of countries have already prohibited labour-only subcontracting.

15. This form of subcontracting being neither necessary nor desirable in the clothing industry, the aim should be to abolish it, especially since it can lead to clandestine work and labour trafficking which are dealt with below in paragraph 21 and the following paragraphs. In the meantime, the workers engaged or employed by labour-only subcontractors should have their status as workers clearly defined and should, as far as is reasonably practicable, also be covered by labour and social security laws and regulations, as well as by the provisions of collective agreements that may be in force in the clothing industry.

*Industrial home work*

16. Industrial home work continues to be practised in the clothing industry. Sometimes it decreases, for example with the modernization of enterprises, sometimes it expands for reasons of flexibility mentioned above or for satisfying employment needs in developing countries, or for still other reasons.

17. This system of industrial home work, which for some workers is the only source of income or the only possibility of contributing to the family budget, and wherein are often found a majority of disadvantaged and vulnerable categories of the population, may give rise to abuses, breaches of law, and to unfair competition. It may sometimes give rise to worse conditions of safety and health, as well as to the use of child labour.

18. On the basis of experience gained in various countries, industrial home work should at least be strictly regulated and the legal status of homeworkers should be established. This would contribute to ensuring, whenever practicable and to the maximum possible extent, an equality of treatment between homeworkers and those doing comparable work in factories, in particular in matters of wage rates, paid holidays, and social security (including sickness insurance, pensions, and unemployment benefits). It is desirable that industrial homeworkers should also be equitably compensated for supplementary expenses directly incurred in the performance of their work.

19. Despite the inherent difficulties, a concerted effort with the active participation of the social partners should be made in each country where home work exists, in order to promote the enforcement of protective measures. This should be done both at the stage of appropriate controls and inspections, such as by registration and similar measures, as well as through information campaigns on the respective rights and obligations of homeworkers and their employers.

20. The Meeting noted with interest and attached particular importance to the proposal concerning a series of national studies on industrial home work which the Office intended to launch and which would show the diversity in the national situations both in the industrialized as well as in the developing countries.

*Clandestine workers and labour trafficking*

21. By definition, it is difficult to know the extent of such phenomena, and to control their consequences. While the problems of clandestine labour and of labour trafficking are by no means peculiar to the clothing industry, this industry does suffer from these abuses, notably in the case of migrant workers without papers or in an irregular situation. These practices could lead to an increase in home work.

22. Here again the problem of unfair competition arises, in addition to the especially difficult individual or family situations that may result.

23. Appropriate sanctions should be applied to those who knowingly contribute to these situations, such as the intermediaries who undertake labour trafficking.

24. Clandestine work should be the subject for a meeting of experts, and of a law and practice report, with a view to the possible inclusion of this item on the agenda of the International Labour Conference.

25. With reference to migrant workers without papers or in an irregular situation, a solution of the relevant problems requires the adoption of a range of coordinated and integrated economic, social and political measures, as well as the cooperation of the authorities of the countries of origin and third countries, and consultations with the social partners.

26. The Meeting took note with interest of the supplementary information provided by the Office with respect to its activities concerning migrant workers without papers or in an irregular situation, as well as the planned meeting of experts on the subject. It considers that these activities should be vigorously continued, in collaboration with other international and regional organizations, and that this meeting of experts should be convened as soon as possible.

## TWELFTH SESSION OF THE BUILDING, CIVIL ENGINEERING AND PUBLIC WORKS COMMITTEE

*(Geneva, 2-10 December 1992)*

### Resolution (No. 102) concerning contract labour and other forms of employment in construction

The Building, Civil Engineering and Public Works Committee of the International Labour Organization,

...

Adopts this tenth day of December 1992 the following resolution:

The Building, Civil Engineering and Public Works Committee of the International Labour Organization invites the Governing Body of the International Labour Office:

1. to request member States of the International Labour Organization:

(a) to ensure compliance with appropriate labour legislation in the case of all forms of employment, including contract work, in line with ILO standards;

(b) to take the necessary measures to encourage:

(i) legislation concerning conditions of work that also cover contract workers;

(ii) appropriate national authorities to monitor the working conditions of contract workers and to enforce relevant national laws;

(iii) workers involved in contract forms of employment to have access to regular conditions of employment;

2. to request the Director-General to implement actively the decisions of the Twelfth Session of the Building, Civil Engineering and Public Works Committee, and to note the high priority given to the issue of contract labour.

## TRIPARTITE MEETING ON SAFETY AND RELATED ISSUES PERTAINING TO WORK ON OFFSHORE PETROLEUM INSTALLATIONS

*(Geneva, 20-28 April 1993)*

### Conclusions concerning safety and related issues pertaining to work on offshore petroleum installations

The Tripartite Meeting on Safety and Related Issues Pertaining to Work on Offshore Petroleum Installations,

...

Adopts this twenty-eighth day of April 1993 the following conclusions:

...

*Contractors*

10. In proportions that vary from country to country and within countries, offshore work is performed by employees of contractor companies. The safety performance of contractors varies, but is a cause for concern. The reasons include the hazardous and often itinerant nature of their work, the varied character and size of the enterprises and the adequacy of training of their staff.

11. Employers who are contractors and their organizations should continue the efforts already begun to upgrade their safety performance, inter alia, by developing and applying appropriate guidelines and good practice, and training and certification (i.e. competence assurance) programmes. Employers who are operators should also

give due weight to safety performance in deciding whether to use contractors and in evaluating and selecting the contractors which they use, and should work with their contractors to improve safety performance. Governments should assure that companies' safety management systems make clear how safety responsibility is divided: responsibility for the overall safety management system should rest with the operator.

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